(1)
Supreme Court, U.S.
FILED
00-524 OCT 4 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MICHAEL R. BARFUS, et al.,

Petitioners,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT D. KLAUSNER
Counsel of Record
ROBERT D. KLAUSNER, P.A.
10059 N.W. 1st Court
Plantation, Florida 33324
(954) 916-1202

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

97 pp + f/o's

QUESTION PRESENTED FOR REVIEW

DOES THE ELEVENTH CIRCUIT DECISION CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL QUOTAS WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE?

LIST OF PARTIES TO THE PROCEEDING

Michael Barfus

Jack Chambers

Darrell Hawks

Edmond Lamb

Robert Robinson

Terry Remland

Michael Fisher[1]

City of Miami, Florida

---

[1] Michael Fisher originally participated as a plaintiff in this action but is not a party to this appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS OF REPORTED DECISIONS ENTERED IN THE CASE	1
STATEMENT OF THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
THE ELEVENTH CIRCUIT DEPARTED FROM ESTABLISHED PRECEDENT BY REFUSING TO FIND DISCRIMINATION WHERE RACE BASED PROMOTIONAL GOALS DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE	7
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) 10, 13

Barfus v. City of Miami, 936 F.2d 1182 (11th Cir. 1991).....3

Black Fire Fighters' Association v. City of Dallas, 19 F.3d 992 (5th Cir. 1994).....11

City of Richmond v. J.A. Croson Company, 488 U.S. 469, 108 S.Ct. 1010, 98 L.Ed.2d 845 (1989).....8, 10

Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 9, 10

Johnson v. Transportation Agency, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).....8

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)....8, 9

United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993).....4, 8

United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997) 4, 12

Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) 8

CITATIONS OF REPORTED DECISIONS ENTERED IN THE CASE

Barfus v. City of Miami, 936 F.2d 1182 (11th Cir. 1991)

Barfus v. City of Miami, 211 F.3d 130 (11th Cir. 2000)

STATEMENT OF THE BASIS FOR JURISDICTION

Plaintiffs/Appellants (hereinafter "the Firefighters") seek Certiorari before this Court to remedy a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*). The Firefighters have been discriminated against on the basis of race and ethnicity, as the only persons who successfully passed the 1985 City of Miami Fire Lieutenant Promotional Exam who did not receive promotion to the rank of Fire Lieutenant.

This Court has jurisdiction under 28 U.S.C. §1254(1).

Petitioner certifies that notification has been served on the United States as is required by Rule 29.4.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Miami, Florida, Code §§40-85, 40-86, 40-87, 40-88

Miami, Florida, City Charter, §36:

> (d) *Rules; examinations; eligible lists; certification of vacancies.* Subject to the approval of the commission, the board shall adopt, amend, and enforce a code of rules and regulations which shall have the force and effect of law providing

for appointment and employment in all positions in the classified service, based on merit, efficiency, character, and industry; shall make investigations concerning the enforcement and effect of this article and of the rules adopted; and shall make an annual report to the commission. The chief examiner shall provide examinations in accordance with regulations of the board and maintain lists of eligibles of each class of the services of those meeting the requirements of said regulations. Positions in the classified service shall be filled from such eligible lists upon requisition from and after consultation with the city manager. When positions are filled, the employment officer shall so certify, by proper and prescribed form, to the director of finance and to the director of the department in which the vacancy exists.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On October 8, 1987, the Firefighters filed an action for violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*). App. 4. The Firefighters claimed that they had been discriminated against on the basis of race and ethnicity in that they were the only persons who successfully passed the 1985 City of Miami Fire Lieutenant Promotional Exam who were not promoted to the rank of Fire Lieutenant, notwithstanding their higher test scores. The City employed race based preferences to promote minority candidates in excess of the City's promotional goals. All of the Firefighters are non-Hispanic white males. The Firefighters contended that the only

reason for the City's failure to promote them to the rank of Fire Lieutenant was their race and ethnicity. The Firefighters further contended the City's promotional goals were arbitrary in that they did not properly reflect the pool of qualified applicants for the rank of Fire Lieutenant.

The Firefighters' Title VII complaint was initially dismissed by the United States District Court for the Southern District of Florida. On appeal to the Eleventh Circuit, the dismissal was overturned and the case was reinstated. *Barfus v. City of Miami*, 936 F.2d 1182 (11th Cir. 1991).

Following remand to the District Court, the parties filed a joint stipulation of facts and opposing memoranda of law in support of their respective requests for final judgment. App. 40. Supplemental authority was filed with the District Court in July, 1997 and February, 1998. On April 29, 1999, the District Court granted final judgment for the City of Miami and dismissed the Firefighters' action. App. 58.

Once again, the Firefighters appealed to the Eleventh Circuit. By order dated March 7, 2000, the Eleventh Circuit affirmed the dismissal of the case. The Firefighters petitioned for rehearing and rehearing en banc, which request was denied by the Eleventh Circuit on July 6, 2000.

B. Statement of Facts

At the time that the Firefighters instituted this action, the City of Miami was governed by the terms of a court ordered affirmative action program (hereinafter, the

"Consent Decree."). *See, United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993) (hereinafter "Firefighters 1") and *United States v. City of Miami*, 115 F.3d 870 (11th Cir. 1997) (hereinafter "Firefighters 2"). The stated purpose of the Decree was to eliminate the effects of prior discrimination on the basis of gender, race and ethnicity in the City of Miami workforce. The Decree enjoined the City of Miami from discriminating against *any* City employee or potential employee on the basis of race, color, sex or national origin. *Firefighters 1*, 2 F.3d at 1498.

The City of Miami, pursuant to City Charter and Code, employs a competitive civil service system for firefighters. *See*, Miami, Florida, City Charter §36 and Miami City Code, Sections 40-85 through 40-88. App. 66, 73. Promotion to the rank of Fire Lieutenant is a civil service rank for which a promotional examination is required. *See* Civil Service Rules 6, 7, and 8, codified as City Code, Sections 40-85 through 40-88. Once the City of Miami has determined to fill a promotional vacancy, it must do so in accordance with the law governing its civil service system.

The parties stipulated to certain relevant facts as follows:

1. The Firefighters would likely have been promoted if rank order promotions were employed.

2. The City employed the "rule of 8" in making certification for promotion from the register.[2]

---

[2] Civil Service Rule 8 permits the City of Miami to certify additional names for promotion who are the highest ranking

3. The departmental goal under the consent decree for this period of time was that 38% of all promotions be accorded to Hispanic, female and African American employees.

4. At the rank of Fire Lieutenant, the City promoted in excess of 38% minorities.

5. No person promoted under the rule of 8 was a victim of prior discrimination in the promotional ranks of the Fire Department.

6. No adverse impact was observed on the promotional exam.

7. On the 1985 exam for Fire Lieutenant, 96 persons took the test and 50 received a passing score.

8. Of 17 black test takers, 8 or 47% passed the test.

---

minorities on a promotional examination if necessary to achieve the goals of the consent decree. This system is known as the "rule of 8." Civil Service Rule 8.7. For the first vacancy, the names of the 5 highest ranking candidates on an eligible register (the list of applicants who have earned promotion based on a written test score) must be certified and the names of the 3 additional candidates from "protected groups as defined in federal regulations" standing next highest from the eligible list must be certified if necessary to "assist the City in meeting hiring or promotional goals established in the aforesaid consent decree or in any affirmative action plan established in accordance with federal laws, regulations or other requirements or when an examination has adverse impact upon members of protected groups." Thereafter, the next highest ranking person on the register and the next highest ranking minority are certified on a one-for-one basis.

9. Of 19 Hispanic test takers, 11 or 58% passed the test.

10. Of 60 Anglo (non-Hispanic white) test takers, including the Firefighters, 31 or 52% passed the exam.

11. No female employees competed for selection on this exam.

12. One hundred percent (100%) of black and Hispanic employees on the promotional register were promoted to Fire Lieutenant.

13. Promotion of black and Hispanic firefighters to lieutenant from the 1985 promotional register exceeded 38%.

14. The Firefighters met the qualifications for Fire Lieutenant during the life of the 1985 promotional register.

The City of Miami reached to the bottom of its promotional list and promoted all minority candidates. The only persons who were not promoted were the Firefighters. Based on the number of promotions made from the register, the Firefighters would have been promoted had preference not been accorded on the basis of race or ethnicity. Of the persons promoted from the register, 44% were minorities despite a goal, utilizing racial preferences, of 38%. None of the persons on the promotional register who received a preference for promotion on the basis of race or ethnicity had ever been a prior victim of discrimination nor did the test result in any adverse

impact on any identifiable group of test takers on the basis of race or ethnicity.

SUMMARY OF THE ARGUMENT

This Court has repeatedly held that race-conscious remedies are subject to strict scrutiny and must take into account the qualifications of the relevant applicant pool. In the present case, the City utilized a department-wide racial/ethnicity/gender quota which did not accurately take into account the number of qualified applicants, by including civilians ineligible for consideration for promotion to Fire Lieutenant and also including within that quota set asides for women, when in fact no female firefighters competed for selection on the promotional examination. The Eleventh Circuit Court's refusal to recognize the existence of unlawful discrimination against the Firefighters on these facts constitutes a departure from well-established precedent sufficient to justify this Court's acceptance of Certiorari jurisdiction.

ARGUMENT

THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL PREFERENCES WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE.

It is well established that race conscious remedies are subject to strict scrutiny and that promotional goals must

take into account the qualifications of the relevant applicant pool. *See City of Richmond v. J.A. Croson Company*, 488 U.S. (1989); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Johnson v. Transportation Agency*, 480 U.S. 616, 632-33 (1987). The City's use of a department-wide, race-based promotional quota for promotions to the rank of fire lieutenant, however, was violative of Title VII. The City's promotional quota included ineligible civilians and assumed a set aside for women despite the fact that no female firefighters competed for selection on the promotional exam in question. The number of qualified applicants (firefighters with the necessary time in grade and successful completion of the promotional exam) was never considered in setting aside positions on the basis of race, gender or ethnicity.

This Court has repeatedly recognized in assessing the appropriate use of race-conscious selection procedures that mere population statistics alone are not appropriate. Rather, it is the pool of qualified applicants and the presence of discrimination which is essential to meeting the constitutional requisites of deciding appointment to positions in public employment on the basis of race. *See Johnson v. Transportation Agency*, 480 U.S. 616, 632-33 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986); *see also United States v. City of Miami*, 2 F.3d 1497, 1509 (11th Cir. 1993). The Eleventh Circuit has itself recognized that in the case of firefighter promotions it is necessary to ascertain the proportion of qualified applicants from each favored group "since the base may be skewed because of a lack of interest by a particular favored group." *United States v. City of Miami*, 2 F.3d at 1507 (11th Cir. 1993).

In the instant case, no women applied for promotion to the rank of lieutenant. Yet, the City arbitrarily employed race based promotional preferences in order to meet a department wide promotional goal that assumed the participation of female firefighters. A further defect with the City's use of the 38% promotional goal at the rank of lieutenant is the fact that the City's promotional goal was computed based on the demographics of the entire fire department, including all civilian employees working as dispatchers, secretaries and clerical personnel. These civilians are expressly excluded from eligibility for fire promotions by the Civil Service Rules.

In *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575 (11th Cir. 1994) the Eleventh Circuit held that affirmative action, when allowed, "must be flexible, reasonably related to the pool of qualified minorities, and impose no undue burden on innocents." *Id.* at 1576. In remanding the case for determination of whether affirmative action plan was reasonably related to pool of qualified minorities, the Court noted that the annual goals lacked flexibility and had been arbitrarily set. Furthermore, the annual goals had been applied "without any consideration of relative qualifications." *Id.* In the present case, the use of the 38% departmental promotional goal for promotions at the rank of lieutenant, without regard to the pool of qualified candidates, is equally if not more arbitrary. Nevertheless, the Eleventh Circuit in this case refused to recognize the existence of unlawful discrimination in the use of the City's arbitrary 38% promotional goal.

Beginning with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court has recognized that

any distinction between citizens based on race or ancestry are "by their very nature" odious to free people whose institutions are founded upon doctrines of equality. In *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), this Court held that voluntary, race conscious, local government affirmative action programs are subject to strict scrutiny. Under strict scrutiny, an affirmative action plan must be based upon a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest. *Croson*, 488 U.S. at 498-508. When, as here, the effects of a race conscious affirmative action program are challenged as a violation of Title VII, the District Court must make a factual determination that the public employer "has a strong basis in evidence for its conclusion that racial discrimination necessitates affirmative action." *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

More recently, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) this Court held that the application of race conscious relief is constitutional only when it is narrowly tailored to further compelling governmental interests. In his concurring opinion, Justice Scalia stated:

> "In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 520 (1989) (Scalia, J. concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing either as a creditor or a debtor race . . . to pursue the concept of racial entitlement even for

> the most admirable or benign of purposes is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government we are just one race here. It is American. *Aderand* at 2118.

According to the Fifth Circuit in *Black Fire Fighters' Association v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994), "so long *as the fire department ranks its employee's exam scores, a* firefighter has an expectation that he can earn promotion through study." The firefighters were the only eligible candidates who were not promoted. All minority candidates who passed the exam were promoted. The City stipulated that none of the minorities who received a race based preference was an actual victim of discrimination. Thus, no vestige of discrimination existed that was in need of a remedy.

The 1985 promotional register for lieutenant expired in March of 1987. In the first three months of 1987, prior to the register's expiration, the City used the "Rule of 8" to promote a total of five minority candidates and only one non-minority candidate. *See* Eligibility Register at pp. 1-2. App. 38. Robert Robinson and Michael Fisher, the highest scoring plaintiffs, were less than ten points from the highest exam score. Nevertheless, at least twelve minority candidates with lower ranking scores were promoted to lieutenant. *See* Eligibility Register at pp. 1-2. App. 38. Under the Rule of 8, a Civil Service Rule adopted to implement the Decree, the first vacancy is filled by certifying from the test register (the listing of scores by rank) the first five names and, if necessary to meet affirmative action goals, the three highest ranking

minorities. Each vacancy thereafter is filled by certifying two names; the highest ranking candidate and highest ranking minority. Even if all five of the highest candidates by score were minorities, the City still adds the next three minorities. A review of the register shows that minorities were often the highest ranking candidates and then also certified as minorities. Thus, non-Hispanic white males such as Petitioners, were completely excluded from the promotional process, solely because of race. Simply stated, the City used its affirmative action program which was designed to eliminate discrimination for the express purpose of discriminating against a class of employees solely because of race. The only observed discrimination in this case was the exclusion of the Firefighters from the City's promotional process. This denial has permanently deprived the Firefighters of rank, pay, seniority, retirement benefits and future advancement. The City misused the Decree in that it established a racial quota based not on the successful examination candidates, but on all personnel in the Fire Department. This included non-sworn persons who can never be promoted within the fire ranks.

The City's policy was simply to promote some persons solely because of their race or ethnicity while intentionally excluding the Firefighters because of their race. The City of Miami's Consent Decree ended in 1997 because the City could not establish any justification for its desire to hold on to this unnecessary practice. *U.S. v. City of Miami*, 115 F.3d 870 (11th Cir. 1997). The Firefighters have been relegated to the status of a political casualty in the City's march to achieving an artificial racial balance in its work force. The Firefighters have been

made the racial "debtors" expressly disapproved by this Court in *Adarand*. Only this Court's review can fairly eliminate that unlawful burden.

CONCLUSION

This Court has repeatedly held that race conscious remedies are subject to strict scrutiny and must take into account the qualifications of the relevant applicant pool. The Petitioners respectfully assert that the Eleventh Circuit's decision constitutes an irreconcilable conflict with this Court's decisions. Wherefore, for the foregoing grounds and reasons, Petitioners respectfully pray this Honorable Court to accept jurisdiction in this matter and consider this case on its merits.

Respectfully submitted,

ROBERT D. KLAUSNER
ROBERT D. KLAUSNER, P.A.
10059 N.W. 1st Court
Plantation, Florida 33324
(954) 916-1202

INDEX TO APPENDIX

		Page
1.	Eleventh Circuit Decision affirming District Court decision, dated March 7, 2000	App. 1
2.	Complaint for Violation of Title VII of the Civil Rights Act of 1964, filed October 28, 1987	App. 4
3.	Answer and Defenses, dated January 22, 1992	App. 10
4.	Consent Decree, dated March 29, 1977	App. 15
5.	Eligible Register, dated March 29, 1985	App. 38
6.	Plaintiffs' Memorandum of Law in Support of Final Judgment, dated December 12, 1995	App. 40
7.	District Court Order Granting Final Judgment Pursuant to the Parties' Stipulated Facts and Memorandum of Law, dated April 29, 1999	App. 58
8.	Eleventh Circuit Order denying rehearing dated July 6, 2000	App. 64
9.	Miami, Florida, City Charter, § 36	App. 66
10.	Miami, Florida, Code §§ 40-85, 40-86, 40-87, 40-88	App. 73

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11530

D.C. Docket No. 87-01984-CV-SH

MICHAEL BARFUS, JACK CHAMBERS, et al.,

Plaintiffs-Appellants,

MICHAEL FISHER,

Plaintiff,

versus

CITY OF MIAMI,

Defendant-Appellee,

Appeal from the United States District Court
for the Southern District of Florida

(Filed March 7, 2000)

Before ANDERSON, Chief Judge, CARNES, Circuit Judge, and OAKES*, Senior Circuit Judge.

---

*Honorable James L. Oakes, Senior U.S. Circuit judge for the Second Circuit, sitting by designation.

PER CURIAM:

Appellants concede that they are not challenging the Consent Decree itself.[1] Rather, appellants acknowledge that they challenge only the alleged discriminatory application of the Consent Decree. The case was submitted to the district court for final determination based upon stipulated facts and written memoranda dated December, 1995. We have carefully reviewed the entire record on appeal. Appellants argued in the district court (and on appeal) that there was discriminatory application of the Decree because the number of minorities actually promoted pursuant to the 1985 promotion register turned out to exceed the goal established pursuant to the Decree. However, appellants adduced no evidence to prove that the "additional certification" provisions of the Decree were inappropriately invoked.[2] Once the properly

---

[1] Thus, we decline to address those arguments which would be relevant only to such a collateral challenge. Moreover, any such collateral attack would contravene the mandate of the prior appeal. *Barfus v. City of Miami*, 936 F.2d 1182 (11th Cir. 1991).

[2] For example, the appellants adduced no evidence that the percentage of minorities already serving as lieutenants (before implementation of the 1985 promotion procedures) made it inappropriate under the Decree to invoke the "additional certification" provisions. Nor did appellants adduce any other evidence that the invocation of the "additional certification" procedure was discriminatory. Appellants' arguments that there has been no recent discrimination and that the test results with respect to the 1985 promotion register reflected no adverse impact constitute disguised attacks on the Decree (and also are beyond the scope of the mandate from the prior appeal); and moreover the arguments are not supported in the record on appeal.

invoked "additional certification" procedures produced a pool of candidates for the promotions, each candidate had to compete on his own merit. Appellants have proved no discrimination in that competitive process.[3]

In sum, appellants wholly failed to prove discrimination in the application of the Consent Decree, and the district court's findings in this regard are not clearly erroneous.

AFFIRMED.

---

[3] In their brief to the district court (which is repeated verbatim in their brief on appeal), the appellants state in conclusory fashion that appellants were better qualified than the minorities actually promoted. The record on appeal contains no evidence to support the assertion except the same conclusory assertion by several of the plaintiffs in interrogatory answers, but with absolutely no facts to support the assertion. We readily conclude that the district court's rejection of factual argument is not clearly erroneous.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 87-1984

MICHAEL BARFUS, JACK CHAMBERS, MICHAEL FISHER, DARRELL HAWKS, EDMUND LAMB, ROBERT ROBINSON, AND TERRY REMLAND,

Plaintiffs,

vs.

CITY OF MIAMI, a municipal corporation,

Defendant.
_____/

CIV-MARCUS
MAGISTRATE
SMARGON

COMPLAINT FOR VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Plaintiffs sue Defendant and allege:

1. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*

2. Jurisdiction is vested in this Court pursuant to 42 U.S.C. Section 2000e-5(f)(3).

3. All conditions precedent to jurisdiction under the foregoing section have occurred and have been complied with by the Plaintiffs.

4. The jurisdiction of this Court has been invoked to secure protection of and redress of deprivation of rights secured by 42 U.S.C. Section 2000e, *et seq.*, which provides

for injunctive and other relief against racial, religious, national origin, and sex discrimination in employment. Notification of right to sue was received from the Equal Employment Opportunity Commission and this complaint has been filed within ninety (90) days of receipt of notification of that right to sue.

5. At all times material hereto, Plaintiffs were citizens of the United States and are employed by the City of Miami Fire Department with permanent Civil Service status.

6. At all times material hereto, Defendant, City of Miami, was a municipal corporation organized and existing under the laws of the Florida with its situs in Dade County, Florida. The City of Miami has had employed fifteen (15) or more employees for each working day and each of the twenty (20) or more calendar weeks in the current calendar year.

7. At all times material hereto, Defendant, City of Miami, was the employer of the Plaintiffs and Plaintiffs were employees of the City.

8. This is a proceeding for a permanent injunction restraining the Defendant from maintaining a policy, practice, custom and usage of withholding, denying, or attempting to withhold or deny, and depriving, or attempting or deprive, or otherwise interfere with the rights of the Plaintiffs to equal employment on the basis of race and national origin.

9. The Complaint also seeks restitution to the Plaintiffs of all privileges, rights, benefits and income that they

would have received but for the Defendant's unlawful and discriminatory practices as herein described.

10. Beginning in 1977, the City of Miami has operated under the terms of a Court-approved affirmative action program known as the "Consent Decree".

11. Under the terms of the Consent Decree, the City is obligated, subject to the availability of qualified applicants, to meet promotional goals within each of its constituent departments, including the Fire Department.

12. The promotional goals are designed to enhance promotional opportunities for minorities, particularly black, Hispanic and female firefighters.

13. The City of Miami also employs a Civil Service System which is provided for in the Charter and Code of the City of Miami and which requires that promotions be attained on the basis of merit and fitness through a system of competitive testing.

14. The City of Miami, in the administration of its Civil Service System and the terms of the Consent Decree, is obligated to promote minority candidates in numbers equal to the Miami city work force population statistics or the percentage of minorities currently employed in the Department, whichever is smaller.

15. On or about March 29, 1985, the City of Miami, Department of Personnel Management, established a promotional register which ranked candidates based upon examination score for eligibility to be promoted to the rank of fire lieutenant.

16. Each of the plaintiffs in this case successfully completed the promotional exam and were ranked on the promotional register.

17. On March 28, 1987, the promotional register expired and Plaintiffs were the only candidates who had successfully completed the exam who had not been promoted.

18. Minority candidates for promotion who ranked below some or all of the Plaintiffs were promoted ahead of Plaintiffs, notwithstanding Plaintiffs' higher scores on the promotional examination.

19. Said minority candidates were accorded a preference in promotion based solely upon race and national origin.

20. But for their status as "Anglo" males, Plaintiffs would also have been promoted to the rank of fire lieutenant.

21. In determining the percentage of minority candidates to be accorded a preference, the City adopted affirmative action goals for the period of time covered by the promotional register.

22. The adopted percentage by the Department of Personnel Management was approximately thirty-eight percent (38%) minority promotions which was reflective of the percentage in the Fire Department of minority employees, as required by the Consent Decree.

23. Notwithstanding that number, the City promoted in excess of its goals in the absence of any specific allegation of discrimination or any demonstrated discriminatory effect on the promotional examination process.

24. As a result of the foregoing, Plaintiffs were denied promotion solely on the basis of race and national origin, despite demonstrated qualification for promotion under the Civil Service System and the promotional examination.

25. In employing promotional goals in excess of those authorized by the Consent Decree, the City has transformed its affirmative action program into a form of reverse discrimination, creating a new class of victims of discrimination who are denied promotion based on factors other than merit.

26. As a result of the adoption of this pattern and practice, Plaintiffs have been deprived of promotion to the rank of fire lieutenant, together with the earnings and other benefits they would have received but for the discriminatory practices of the Defendant.

WHEREFORE, Plaintiffs pray:

A. That this Court enter a permanent injunction directing the promotion of the Plaintiffs with retroactive pay and seniority and further directing the City to cease and desist all discriminatory practices based on race and national origin;

B. That Plaintiffs be made whole for all salaries and emoluments which they would have received but for the discriminatory practices of the Defendant;

C. That Plaintiffs be awarded costs and reasonable attorneys' fees; and

D. That Plaintiffs have such other relief as this Court shall deem appropriate.

ROBERT D. KLAUSNER, P. A.
1922 Tyler Street
Hollywood, Florida 33020
920-1052

By /s/ Robert D. Klausner
ROBERT D. KLAUSNER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-1984-CIV-MARCUS

MICHAEL R. BARFUS, JACK CHAMBERS, MICHAEL D. FISHER, DARRELL HAWKS, EDMUND LAMB, ROBERT ROBINSON, AND TERRY REMLAND,

Plaintiffs,

vs.

CITY OF MIAMI,
a municipal corporation,

Defendant.
_____/

ANSWER AND DEFENSES

Defendant, CITY OF MIAMI, answers the Complaint according to the numbered paragraphs thereof and states:

1. Defendant admits the allegations contained in paragraph #1 of the complaint.

2. Defendant admits the allegations contained in paragraph #2 of the complaint.

3. With respect to plaintiffs Edmund Lamb, Michael Barfus, Michael Fisher, and Robert Robinson, defendant admits the allegations contained in paragraph #3 of the complaint. With respect to all other plaintiffs, defendant is without knowledge of the allegations contained in paragraph #3 of the complaint and therefore these allegations are denied as to plaintiffs Jack Chambers, Darrell Hawks, and Terry Remland.

4. Defendant is without knowledge as to why the jurisdiction of this Court has been invoked and therefore the allegations pertaining to same are denied. Except for plaintiffs Edmund Lamb, Michael Barfus, Michael Fisher, and Robert Robinson, defendant is without knowledge as to whether notification of right to sue was received from the Equal Employment Opportunity Commission (EEOC) and that this Complaint was filed within ninety (90) days of receipt of notification of that right to sue and therefore allegations pertaining to same are denied as to plaintiffs Jack Chambers, Darrell Hawks, and Terry Remland, and admitted as to plaintiffs Edmund Lamb, Michael Barfus, Michael Fisher, and Robert Robinson.

5. Defendant admits the allegations contained in paragraph #5 of the complaint.

6. Defendant admits the allegations contained in paragraph #6 of the complaint.

7. Defendant admits the allegations contained in paragraph #7 of the complaint.

8. Defendant admits that paragraph #8 of the complaint sets forth a description of the injunctive relief sought by plaintiffs. Defendant denies that plaintiffs are entitled to such relief.

9. Defendant admits that paragraph #9 of the complaint describes the restitution sought by plaintiffs. Defendant denies that plaintiffs are entitled to such restitution and denies further that defendant has committed any unlawful and discriminatory practices as alleged.

10. Defendant admits the allegations contained in paragraph #10 of the complaint.

11. Defendant admits the allegations contained in paragraph #11 of the complaint.

12. Defendant admits the allegations contained in paragraph #12 of the complaint.

13. Defendant admits the allegations contained in paragraph #13 of the complaint and further avers that competitive testing is only one factor to be considered in making promotions.

14. Defendant admits, as to paragraph #14 of the complaint, that the terms of the Consent Decree at paragraph (6)(b) set forth the minimum yearly promotional goals of each City department, until the long term goal has been met for a period of one year, as being either parity with the Miami City workforce population statistics or the percentage of minorities currently employed in the department whichever is smaller. Defendant denies that the Consent Decree obligates the City of Miami not to ever exceed the minimum yearly promotional goal as set forth in paragraph #6(b) thereof. (A copy of the Consent Decree is attached hereto as an exhibit.)

15. Defendant admits the allegations contained in paragraph #15 of the complaint.

16. Defendant admits the allegations contained in paragraph #16 of the complaint.

17. Defendant admits the allegations contained in paragraph #17 of the complaint.

18. Defendant admits that minority candidates for promotion who ranked below some of the plaintiffs on

the register were promoted ahead of plaintiffs, notwithstanding plaintiffs' higher scores than some of the promoted minority candidates on the promotional examination.

19. Defendant denies the allegations contained in paragraph #19 of the complaint.

20. Defendant denies the allegations contained in paragraph #20 of the complaint.

21. Defendant admits the allegations contained in paragraph #21 of the complaint.

22. Defendant admits the allegations contained in paragraph #22 of the complaint.

23. Defendant admits that the City promoted in excess of the 38% minimum goal. Defendant is without knowledge of the remaining allegations in paragraph #23 of the complaint and therefore denies same.

24. Defendant denies the allegations contained in paragraph #24 of the complaint.

25. Defendant denies the allegations contained in paragraph #25 of the complaint.

26. Defendant denies the allegations contained in paragraph #26 of the complaint. Defendant further denies that plaintiffs are entitled to the relief for which plaintiffs pray in the "WHEREFORE" clause.

DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. Defendant acted lawfully in accordance with a court-approved, court-enforced Consent Decree which meets the EEOC's guidelines regarding affirmative action plans and with the Civil Service Rules.

Respectfully submitted,

A. QUINN JONES, III, City Attorney
ALBERTINE B. SMITH, Chief Asst. City Atty.
Attorneys for CITY OF MIAMI
300 Dupont Plaza Center
300 Biscayne Boulevard Way
Miami, Florida 33131
Telephone: (305) 579-6700

By /s/ Albertine B. Smith
Albertine B. Smith
Chief Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 22 day of January, 1992 to: ROBERT D. KLAUSNER, ESQ., Atkinson, Diner, Stone, Cohen & Klausner, P.A., Attorney for Plaintiffs, 1946 Tyler Street, Hollywood, Florida 33022-2088.

By Albertine B. Smith
Albertine B. Smith
Chief Assistant City Attorney

ABS/mv/M384

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF MIAMI, et al. Defendants.	CIVIL ACTION NO. 15-3096-CIV-JE CONSENT DECREE (Filed March 29, 1977)

The plaintiff United States of America has filed its complaint in this action against the City of Miami alleging that the defendants are engaged in a pattern and practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3766, as amended, and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221 *et seq.*

The Court has jurisdiction over the parties and the subject matter of this action.

The parties have waived hearing and the entry of findings of fact and conclusions of law on all issues covered by this Consent Decree, and have agreed to the entry of this decree which shall not constitute an adjudication or an admission by any of the defendants of any violation of law.

The plaintiff recognizes the adoption by the City Commission of the City of Miami of Resolutions No. 75-636 and 75-953 and Motion No. 75-727 as evidence of good faith efforts by the City of Miami to take affirmative action to increase minority and female participation throughout the City's work force.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant City of Miami, its officials, agents, employees, and all persons in active concert or participation with them in the performance of City functions (hereinafter collectively referred to as the City) are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the City of Miami because of such individual's race, color, sex or national origin. Specifically, the City shall not fail or refuse to hire, promote, upgrade, train or assign any individual, discharge any individual or otherwise discriminate against any individual as an employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of race, color, sex or national origin.

In no event shall the City be required to hire unnecessary personnel, to hire, transfer or promote a person who is not qualified, or to hire transfer or promote a less qualified person, in preference to a better qualified person, consistent with the provisions of this decree.

2. Recruitment

a. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform blacks, Latins and women of job opportunities with the City, for the purpose of securing sufficient qualified applicants to enable the City to meet the hiring goals set forth herein. The recruitment program shall include maintaining contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities for City residents. In addition, where appropriate, advertising of employment opportunities shall be placed in radio stations and other mass media primarily directed to black, Latin and female audiences for the purpose of emphasizing to minorities and women the availability of employment positions. It is understood that the present recruiting area is the city limits of the City of Miami, and such schools, organizations and media utilized shall be consistent with this policy.

In the event it is determined by the City (by its Civil Service Board) that recruiting solely within the City of Miami fails to produce sufficient qualified applicants or is not productive of results as envisioned in this decree, the recruiting area may be enlarged to include Dade County. In the event the recruiting area is enlarged, persons on civil service registers who do not reside in the City of Miami will be considered for employment only after there are no City residents remaining on the register.

b. Police Department. The City shall operate the Law Enforcement Community Outreach and Career Program (the Tri-Cultural Program) as long as

federal grant funds continue to be made available for that purpose. The City will continue to make applications for grant funds for the Tri-Cultural Program. In the event such federal funds are discontinued the City shall develop a police officer recruiting program of a similar nature and shall submit it to the plaintiff for approval prior to its commencement, provided that approval will be assumed if no reply is received within 30 days.

c. Fire Department. The City shall continue to pursue an active program to recruit blacks, Latins, and women who meet the requirements to become firefighters. Workers in City departments shall be included in the recruiting program.

In such recruiting program the City may continue to cooperate with the International Association of Firefighters Labor Recruitment Program, and Miami Firefighters Association No. 587, if such organizations exhibit a continued willingness to engage in such cooperation.

The City, through the International Association of Firefighters Labor Recruitment Program, shall also provide assistance to applicants to prepare for both written and physical tests and for oral interviews, as well as orientation to assist applicants in the Fire College training program required for entrance of firefighters upon employment.

The City shall provide sufficient information on test content at least three months in advance of the expected examination date to enable such organizations to develop and implement an adequate training program.

The City understands that this program will supplement the normal selection process, for the period of this Decree. The City shall seek to select 30% of

new appointments from among those applicants who participated in the minority recruitment and training program, if sufficient qualified applicants are obtained by this means. This paragraph is to be consistent with those goals established for the fire department in paragraph 5 of this decree.

In the event the International Association of Firefighters recruitment program is discontinued and the Firefighters Association No. 587 is no longer able or willing to cooperate in the recruitment program for the Fire Department, the City shall develop a similar Firefighter recruitment program and shall submit it to the plaintiff with the next report required under this decree.

3. Selection Procedures

Except as otherwise provided in this decree, the City shall consider applications for employment from any person who meets the current criteria for any given position, without regard to such person's race, color, sex or national origin, provided, however, that no standards shall be applied to exclude blacks, Latins and women which are not also applied to disqualify white Anglo males. Specifically:

(a) Testing Requirements

The City shall not use any written examination for employment or promotion which has an adverse impact on blacks, Latins or women unless it can be shown to be predictive of successful job performance, or can otherwise be shown to be job related, in accordance with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Employee Selection Procedures,* 29 CFR §1607 *et seq.*, except that:

(1) The City may continue to use such tests during the time they are being validated in accordance with the EEOC *Guidelines*, and the use of such tests will not be considered a defense against failure to meet the goals set forth in paragraph 5 below.

(2) The City may continue to use skill tests of actual job content (for example typing and filing).

(3) The City shall continue to provide exams in Spanish for positions which do not require proficiency in English.

(4) Nothing in this paragraph shall prevent the administration of tests on a research basis during the term of this decree, provided the results of such tests are not used in any manner in hiring, promotion or transfer decisions or in the evaluation of personnel, and the scores and/or relative performance of the persons tested are not made known to any individuals other than those directly involved in the analysis of the test.

(b) Education Requirements

The City shall continue to review job descriptions for the purpose of evaluating the need for a high school diploma or equivalency certificate, or an associate or bachelor's degree, as a general qualification for employment. The City shall discontinue the use of an education requirement for any position for which such a degree or diploma is unnecessary and where the continued use of such a standard will have the effect of disqualifying blacks, Latins or women at higher rates than white Anglo males. The results of such review shall be submitted to counsel for

plaintiff along with the first report required under this decree.

(c) Background Investigation

The background investigation shall not include, nor shall any black, Latin or woman be rejected for employment on the basis of, any inquiry which is not routinely made about white Anglo males.

(d) Personal (Pre-Employment) Interview

No personal (pre-employment) interview (including police oral review board) conducted with respect to women, blacks and Latins shall include, nor shall any woman, black or Latin be rejected for employment on the basis of, any inquiry which is not routinely made of white Anglo males.

(e) Medical Examination

The medical or physical examination required of all applicants shall be the same for all applicants, in accordance with job requirements. Whenever an applicant believes s/he has been erroneously disqualified on the basis of the medical or physical examination, s/he shall be given the opportunity to secure an additional diagnosis, at the applicant's expense, from two independent physicians agreed upon between the City and the applicant. Should the physicians agree that the applicant is qualified according to regularly established physical standards, such evidence of fitness shall entitle the applicant to be considered for employment, in the absence of any other disqualifying factor.

(f) Physiological Qualifications

The physiological qualifications applied to any position shall not include any standards which operate disproportionately to exclude blacks, Latins or women and which have not been shown to be valid or otherwise demonstrably job-related in accordance with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Employee Selection Procedures*, 29 CFR 1607 *et seq.* Any test of physical agility required to be completed in order to qualify for appointment to any City position, particularly to entry level positions in the Police and Fire Departments, shall be administered to blacks, Latins and women in the same manner and under the same conditions as such tests are administered to white Anglo males.

(g) Police and Fire Departments

For purposes of the fire department the requirements of the state firefighters standards council shall apply. For purposes of the police department, the standards of the Police Standards and Training Commission of Florida shall apply. Should such state standards change or be modified in apparent disagreement with federal law, such changes shall be discussed by the parties.

(i) Criminal Record

Applicants for employment shall not be disqualified solely on the basis of an arrest record.

A record of criminal conviction may be used to reject an applicant for the position of police officer only if the applicant has been convicted of a felony or of a misdemeanor

involving "moral turpitude" as the term is defined by law or if the applicant has been released or discharged under any other than honorable conditions from any of the armed forces of the United States.

An applicant for the position of fire fighter who has been convicted of a felony may be excluded from consideration for employment for a period of four years after expiration of sentence or final release by the parole and probation commission unless the applicant, prior to the expiration of the four-year period, has received a full pardon or has had his/her civil rights restored.

The above provisions shall not be construed to prevent consideration of an arrest record with respect to the qualifications of an applicant where arrests have resulted in indictments or information against an individual and where these indictments or informations are for felonies or misdemeanors involving moral turpitude even though there is no actual conviction.

(ii) Polygraph Examination

A polygraph examination (lie detector test) may be administered only to applicants for positions requiring bonding and positions of trust or security. No questions shall be asked of black, Latin or female applicants which are not also regularly asked of white Anglo male applicants, and in no event shall an applicant be asked any questions which are not directly job-related. Under no circumstances shall the polygraph be used as the sole disqualifying factor in the screening of any applicant. The polygraph examination

shall be administered to black, Latin and female applicants on the same terms and under the same conditions as those applied to white Anglo male applicants.

(iii) Minimum Age

Any applicant who shall have reached the age of 18 shall be eligible for appointment as a firefighter or a public service aide.

(iv) Police Academy and Fire College

Training for entry level police officers and firefighters shall be administered to blacks, Latins and women on the same terms and under the same conditions as such training is administered to white Anglo males.

4. Assignment

a. The City shall not discriminate on the basis of race, sex or national origin in the assignment of employees in any department, except as may be consistent with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Discrimination Because of Sex*, 29 CFR 1604 *et seq.*, and its *Guidelines on Discrimination Because of National Origin*, 29 CFR 1606 *et seq;* and by the Office of Revenue Sharing of the U.S. Department of Treasury in Section 51.54 of its Rules and Regulations, 31 CFR Part 51.

b. Sanitation Department

The City agrees to establish lines of progression within the Waste Collection Division of the Sanitation Department as follows:

A list of stand-by laborers will be established who will be offered employment on a daily basis to fill positions held by probationary or permanent waste collectors who are absent on their assigned work day.

As vacancies occur in the waste collectors classification, the department director shall select, with the assistance of the Sanitation Employees Association Committee, a replacement from the established list of stand-by laborers.

The City will train qualified waste collectors in the operator operations of the desired type of equipment utilized by waste collector I. Vacancies in the classification of waste collector operator I shall be filled by the selection of one of such trained personnel by the department director, with the assistance of the Sanitation Employees Association Committee.

The City shall offer training in the operation of the equipment utilized in the next higher classification and repeated throughout the equipment operations series.

The lines of progression following that shown above shall be:

WASTE COLLECTOR OPERATOR II
WASTE EQUIPMENT OPERATOR

The City further agrees that the classification of sanitation foreman and sanitation inspector I will be filled from existing permanent employees within the Sanitation Department in accordance with the goals established herein for blacks, Latins and women.

c. Police Department

The City shall evaluate its time in grade and performance evaluation requirements for promotion and for assignment to positions other than police officer and shall develop time in grade and performance evaluation standards which do not have the effect of selecting white Anglo males at a higher rate than blacks, Latins or women. Such selection process shall be consistent with the goals and timetables set forth in this decree for promotion. A review of this paragraph shall be made at any time upon the election of either party.

5. Goals

In order to eliminate the effects of past discriminatory practices against blacks, Latins and women the City shall adopt and seek as its long term goal the participation at all levels throughout its work force of blacks, Latins and women approximating their respective proportions in the City's labor force, as determined by the United States Bureau of the Census. The purpose of this goal is to eliminate the substantial underrepresentation and uneven distribution of blacks, Latins and women throughout the City's work force.

(a) Hiring

In order to achieve this long germ goal, subject to the availability of qualified applicants, the following recruitment and hiring goals shall be established for blacks, Latins and women (blacks and Latins are referred to collectively in this paragraph 5 as minorities). It is understood that the goals are minimums, and that the City shall seek to fulfill the goals by hiring blacks, Latins and

women generally in proportion to their representation in the labor force. Only full time regular civil service employees who have successfully completed their probationary period, or, in the case of the Police and Fire Departments, those who successfully complete the police academy or fire college, shall be counted in determining progress toward the goals. Progress toward these goals shall be measured on an annual basis.

(1) For each entry level position of police officer, public service aide, fire fighter and traditionally white Anglo male positions in the Departments of Finance and Building, the goal shall be 56% minorities and women each year. For purposes of this subparagraph, traditionally white Anglo male positions shall include such positions as building inspector, zoning inspector and skilled trades.

(2) For each traditionally black entry level service and maintenance position in the Departments of Sanitation and Public Works, the goal shall be 35% other than black each year. For purposes of this subparagraph, traditionally black entry level service and maintenance positions shall include such positions as laborers and waste collectors.

(3) For each entry level skilled craft, technical and lower level administrative position throughout the City, the goal shall be 50% minorities and women each year. For purposes of this subparagraph, skilled craft positions shall include such positions as mechanic (including automotive, air condition and heavy equipment mechanic), carpenter, electrician, lineman, machinist, painter, pipefitter, plumber and welder; technical positions shall include

such positions as engineering, identification and planning technicians; and lower level administrative positions shall include white collar non-technical positions such as administrative aid, clerk, secretary, keypunch operator.

(4) For each entry level paraprofessional position, 40% minorities. For purposes of this paragraph, paraprofessional shall include such positions as foreman, supervisor, computer programmer.

(5) For entry level professional positions, the goal shall be 30% minorities and women each year. For purposes of this paragraph, professional shall include such positions as accountant, engineer, manager, architect, publicity writer.

(6) For entry level official and upper level administrative positions, the goal shall be 20% minorities and women each year.

(b) Promotion

Subject to the availability of qualified applicants, promotional goals shall be established for minorities, on a department basis, with each department having as its yearly goal, until the long term goal has been met for a period of one year, either parity with the Miami City workforce population statistics or the percentage of minorities currently employed in the department, which ever is smaller. Priority opportunity for promotion (as defined in paragraph 7(b) below) within a particular department shall be provided to qualified persons who have indicated a desire or interest in the promotion, transfer and assignment opportunities created by this decree. Each person responding to this request shall be

promoted or transferred pursuant to the provisions of paragraph 7 below.

6. Affected Class

The term "affected class", as used in this decree, shall include the following:

(a) All incumbent black and Latin employees currently holding positions with the City who were initially assigned to traditionally black or Latin jobs.

(b) All incumbent women employees currently holding positions with the City who were initially assigned to traditionally female jobs.

(c) All blacks, Latins and women identified as having been discriminatory denied employment opportunities (including promotion and terms and conditions of employment), or terminated since March 24, 1972.

7. Promotion and/or Transfer Pool

(a) The City shall compute the seniority of each member of the affected class interested in this provision based on the total seniority of that person with the City. The City shall maintain a list of people signing up under the provisions of this paragraph 7.

(b) A member of the affected class shall be given the initial opportunity to fill any vacancy in the City where the person is the senior applicant who meets, or could reasonably be expected to meet after an initial probationary period, the minimum qualifications for the position unless a applicant not a member of the affected class has demonstrably superior qualifications. This preference shall be exercised at the written election of the applicant.

An affected class member using this preference who successfully completes the probationary period shall at that time be informed that s/he can remain in that position or return to his/her prior position.

(c) If no affected class member seeks or is entitled to a vacancy as provided in (b) above, the vacancy shall be filled pursuant to the procedures and goals for hiring set forth in this decree.

(d) All members of the affected class shall be notified of the provisions of this decree and specifically of the opportunity to transfer and/or be promoted to other positions either within the same department or in other departments when such vacancies occur and notices to fill them are posted by the Civil Service Board. At least ten (10) days before any such vacancies are to be filled, notices of the vacancies shall be posted at convenient locations in each department or division where members of the affected class are employed. Unclassified positions are exempt from this requirement.

(e) No member of the affected class who makes a lateral or downward transfer for the purpose of enhancing promotional opportunities, shall be paid at a lower rate than the rate for the job from which she transferred, including any regular within grade increments s/he would have received had s/he remained on that job. A person utilizing rate retention pursuant to this paragraph who returns or is returned to her/his original job pursuant to subparagraph (b) above, may utilize the right to rate retention on a subsequent transfer, provided, however, that this right to rate retention may not be exercised on more than three occasions. The right to rate retention

shall continue until a transferee has reached that level in the new department or line of progression where the rate of pay is equal to or higher than that in the previously held job classification. A transferree shall lose this privilege of rate retention if s/he refuses a promotion in the new line of progression or fails to bid on a higher rate job in the new department for which s/he is eligible.

(f) Rights of a member of the affected class under paragraph 7 are limited to (1) one successful promotion or transfer, or (2) three unsuccessful attempts to promote or transfer.

8. Specific Relief

(a) The City shall establish a fund in an amount sufficient to cover its back pay liability under this Decree. The dollar amount, identification of recipients, and terms for acceptance of back pay for affected class members shall be consistent with the provisions of this Decree and shall be determined by negotiations with the United States and the City.

(b) Certain persons identified in Paragraph 6 (c) of this Decree have charges currently pending before the EEOC which were filed before the entry of this Decree and which allege employment discrimination by the City of Miami.

The United States and the City will make a good faith effort to resolve the aforementioned charges within the framework of this Decree.

In situations where agreement is reached concerning entitlement to specific relief for any of the aforementioned persons, the names of the persons and the specific

relief agreed upon for each shall be submitted to the Court within an appropriate period.

In cases of disagreement between the United States and the City concerning resolution of the aforesaid charges, either party may apply to the Court for a resolution of the matter at issue.

(c) Nothing in this Decree will be construed as limiting the rights of any individual as provided by Section 706 of Title VII, 42 US Code, Section 2000e-5.

(d) Each person entitled to receive back pay or other specific relief pursuant to this Decree shall be offered such back pay or other relief conditioned upon execution of an agreement releasing the City from further liability for relief based on matters covered by this Decree occurring before its effective date. No back pay pursuant to this Decree shall be awarded for promotions or transfers made more than five (5) years after the effective date of this Decree. No person shall be entitled to receive back pay more than once.

9. Record Keeping

The City shall retain during the period of this Decree necessary records to support the implementation of this Decree. These records shall be made available to the Department of Justice for inspection and copying upon written request.

The City will maintain the following records:

(a) A list of all organizations and schools which are contacted pursuant to Paragraph 2, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that

notice, and the date through which applications could be received for the job which was advertised, including a summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of defendant's employee who made the contact and the nature of the contact.

(b) All written applications and related records for all persons seeking employment with the City, including applications for transfer within or among departments, for a period of three (3) years, and shall include on such applications identifications of the applicant by race, sex and national origin.

(c) Pass/fail results by race, national origin and sex for all selection standards administered by the City, except those excluded in paragraph 3(a) of this Decree.

(d) All written communications between the City and applicants for both initial entrance, transfer and promotion.

(e) Sufficient records on part-time, temporary and seasonal employee to assure accurate and complete reports for these employees as required in paragraph 10(h).

10. Reporting

Within ninety (90) days after the entry of the Decree, and following June 30 and December 31 of each subsequent year during the term of this Decree, the City shall report to the Attorney General [to the attention of Chief, Employment Section, Department of Justice, Washington, D.C. 20530 and of the Compliance Manager, Compliance

Division, Office of Revenue Sharing, Department of the Treasury, Washington, D.C. 20226] the following inform:

(a) A summary showing the total number of employees by race, sex and national origin in each job classification of the City.

(b) The list of members of the promotion pool by department required by paragraph 7(a) of this decree.

(c) A report showing the positions for which persons in the affected class have applied, name of the person, the dates of such applications and whether or not such applications were successful. The report should also show any position which the persons in the affected class have been offered but which they refused, showing both the job offered and the dates thereof.

(d) A list of all newly hired employees indicating the name, race, sex, national origin and job classification of each since the last report was filed.

(e) A list of all person, by job classification, to whom promotion has been offered under paragraph 7(b) of this Decree and whether or not that promotion has been accepted.

(f) A list of all promotions, name, race, sex, national origin and date of hire of the employee promoted and the date of the promotion.

(g) A breakdown of the applicant flow of the City by race, sex and national origin which indicates the number of applicants by race, sex and national origin hired, rejected and pending

for each job classification. A person is considered an applicant for this purpose upon filing a formal application when a job is posted and upon meeting the minimum qualifications for the position.

(h) Pass/fail results by race, national origin and sex for all selection standards administered by the City, except those excluded in paragraph (3)a of this decree.

(i) A list of part-time employees, to include race, sex, national origin and job classification and term of employment.

11. EEO Officer

Copies of this Decree shall be provided by the Plaintiff to be posted in conspicuous locations within each Department and/or operational unit of City Department. Further, the City shall appoint an EEO officer for the City whose duties shall include:

(a) To advise black, Latin and female employees of the terms of this Decree.

(b) To receive and investigate complaints of race, sex and national origin discrimination; and to conciliate when appropriate; and

(c) To maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to the defendant and/or any investigatory files. The individual appointed as EEO officer shall have his office hours and location posted conspicuously beside the Consent Decree.

12. Definitions. For purposes of this decree, the following terms shall have the meanings set forth below.

a. Assignment shall include the initial appointment of an employee to a particular department or job classification and the duties and responsibilities of an employee in a job classification.

b. Black shall include males only.

c. Effective date shall mean the date of entry of this decree.

d. Honorable conditions shall mean honorable and general discharges.

e. Latin shall mean males of Cuban, Puerto Rican, Mexican or other Latin American origin.

f. Promotion shall mean the elevation of an employee to the next job classification in a given job ladder or line of progression.

g. Transfer shall mean the lateral movement of an employee from one line of progression to another, either within one department or among departments.

h. Women shall include all females, regardless of race or national origin.

13. Jurisdiction

The Court retains jurisdiction of this action for such further orders as may be appropriate. At any time after five years subsequent to the date of the entry of this Consent Order, the City may move the Court upon 45 days notice to the plaintiff for dissolution of this decree, and in considering whether the decree should be dissolved, the Court will take into account whether the City

has substantially complied with this decree and whether the basic objectives of the decree have been achieved.

Dated Mar. 29, 1977.

/s/ Joe Eaton
UNITED STATES DISTRICT JUDGE

By Consent:

/s/ Illegible

/s/ Illegible
On behalf of the United States

/s/ John Illegible
On behalf of the City of Miami

BEST AVAILABLE COPY

OCC CODE ____

ELIGIBLE REGISTER

Classification: FIRE LIEUTENANT

Type: PROMOTIONAL

Closing Date: JANUARY 21, 1985 Exam Date FEBRUARY 14, 1985

Established by: Donald Williams
Director of Human Resources

Date (s) established:
Original 3/29/85
Supplement ____
Correction APRIL 19, 1985

Date One Year Old 3/29/86

expire 3-28-87
Rev Version 3-12-87

No. Competing: 96
No. Passed: 50
No. Failed: 46

DNA: 13
INEL.: ____
PEND: ____

DATE OF ENTRY

ID No	Name, Race & Sex	Vets Pref.	Final Grade	Actions
	PASSED			
5-9-79	1042 Harper, Steven J.	AM	0	94.231 3-29-85 (neeley)
4-28-80	1103 Valladares, Jorge F.	LM	0	93.267 3-29-85 (cannon)
10-20-75	1020 Cinilia, Scott W.	AM	0	93.265 3-29-85 (molina)
4-14-75	1069 Moore, Frank C.	AM	0	93.265 3-29-85 (cannon-WArne)
3-17-80	1092 Simpson, Timothy C.	AM	0	92.822 6-11-85 (estavanell
4-14-75	1109 Wright, Robert	AM	0	92.264 7-7-85
3-17-80	1044 Hart, Jon E.	AM	0	92.476 7-7-85
5-22-72	1076 Penland, Raymond	AM	0	92.313 7-7-85
4-29-63	1102 Turner, Thomas A.	AM	0	92.018 7-7-85
3-6-69	1003 Anderson, William S.	AM	0	91.423 9-9-85 (Wasnick)
5-22-72	1011 Bickett, Thomas N.	AM	0	91.052 1-1-86 (Ryan)
1-17-74	1079 Pilger, Daniel T.	AM	0	90.977 1-3-86 (Hunt
6-19-78	1074 Paugh, James R.	AM	0	90.879 1-4-86 (Weinstein)
6-14-76	1016 Burns, Joe	AM	0	90.789 1-4-86
6-19-78	1059 Lehmann, Rex P.	AM	0	90.259 1-8-86
6-19-78	1090 Sheridan, William J.	AM	0	90.259 1-11-86
4-28-80	1072 Oestreich, Bruce A.	AM	0	90.229 1-12-86
4-28-80	1060 Lewycky, William	AM	0	89.164 1-12-86 EVANS
1-6-75	1080 Pilger, Donald P.	AM	0	89.023 1-12-86 HUNT
6-19-78	1061 Lissabet, Nelson	LM	0	88.902 1-13-86 Caldwell
4-15-74	1006 Ballesteros, Felix E.	LM	0	88.455 6-23-85
3-17-80	1018 Castillo, Michael	LM	0	88.219 7-7-85
4-5-82	1039 Gilbert, James	AM	0	88.164 1-14-86 Ryan
11-3-80	1034 Farber, David A.	LM	0	87.729 1-14-86 Hernandez
10-9-73	1096 Strosnider, Richard	AM	0	86.897 1-14-86 Hayward
10-9-73	1085 Richardson, William	AM	0	86.819 11-2-86 Given
5-22-72	1094 Smith, John A.	AM	0	86.381 12-23-86 Ivey
10-20-75	1043 Harrison, Henry	LM	0	86.274 1-5-87 Terrell
4-29-63	1030 Dougherty, Thomas M.	AM	0	85.663 1-12-87
3-6-72	1087 Robinson, Robert	AM	0	85.565
11-3-80	1091 Simmons, Robert	BM	0	85.331 6-23-85
4-14-76	1035 Fisher, Michael D.	AM	0	85.313

App. 38

ELIGIBLE REGISTER

Classification: FIRE LIEUTENANT

Type: PROMOTIONAL

Closing Date: JANUARY 21, 1985 Exam Date FEBRUARY 14, 1985

Established by: [signature] Director of Human Resources

Date (s) established:
Original 3/29/85
Supplement
Correction APRIL 19, 1985

Date One Year Old 3/29/86

No. Competing: 96
No. Passed: 50
No. Failed: 46

DNA: 13
INEL:
PEND:

App. 39

	ID No	Name, Race & Sex	Vets Pref.	Final Grade	Actions
		PASSED			
9-22-69	1045	Hawkes, Darrell W. AM	0	84.871	
5-5-80	1073	Parker, Ralph BM	0	84.758	6-23-85
6-19-78	1033	Fallad, Jose L. LM	0	84.370	2-9-87
6-19-78	1083	Remland, Terry AM	0	84.178	
5-7-79	1063	Lyons, Edwin C. BM	0	83.607	7-7-85
10-20-75	1019	Chambers, Jack AM	0	83.355	
11-18-71	1057	Lamb, Edmund AM	0	83.190	
11-3-80	1024	Darley, Peter J. LM	0	82.980	7-7-85
11-3-80	1058	Ledea, Philip A. LM	0	82.066	7-7-85
6-14-76	1007	Barfus, Michael R. AM	0	81.938	
8-15-66	1086	Roach, Patrick R. AM	0	81.462	
3-17-80	1009	Barreto, Jorge L. LM	0	78.211	7-7-85
11-3-80	1088	Sellers, Homer N. BM	0	77.890	7-7-85
6-19-78	1027	Davis, Willie L. BM	0	77.622	7-7-85
11-3-80	1052	Johnson, Reginald BM	0	77.541	7-7-85
6-19-78	1082	Quatlo, Philip BM	0	77.529	1-6-87
3-17-80	1021	Cunningham, Herbert BM	0	76.951	1-8-87
3-17-80	1029	Dennis, Nathaniel BM	0	76.062	2-17-87 Talbot
		FAILED			
	1001	Allen, Willis M. AM	0		
	1002	Allison, Charles P. AM	0		
	1004	Aparicio, Hiram I. LM	0		
	1010	Barron, William AM	0		
	1012	Bjorkman, Russell L. AM	0		
	1013	Bonsignore, Philip AM	0		
	1014	Brodie, Steven R. AM	0		
	1015	Bryan, Harold AM	0		
	1022	Clark, David D. BM	0		
	1023	Cromer, Gary AM	0		
	1025	Davies, Paul AM	0		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 87-1984-CIV-KEHOE

MICHAEL R. BARFUS, et al.,

Plaintiffs,

vs.

CITY OF MIAMI, a municipal corporation,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL JUDGMENT

INTRODUCTION

Plaintiffs, Michael Barfus, et al., are City of Miami Firefighters who successfully completed the 1985 promotional exam to the rank of fire lieutenant. Each was placed on the promotional register and certified as eligible for promotion.

On March 28, 1987, the two year register expired with the Plaintiffs being the only successful candidates for a promotion who were not promoted.

The Plaintiffs filed a Complaint with the Equal Employment opportunity commission contending that they were denied promotion on the basis of race, gender, and ethnicity. In other words, the Plaintiffs contend that they were excluded from consideration for a promotion because they are white, non-hispanic males.

The EEOC issued right to sue letters and a timely Complaint was filed in the United States District Court for the Southern District of Florida, contending that the

City's failure to promote the Plaintiffs violated Title VII of the Civil Rights Act of 1964. The Complaint was dismissed and an appeal taken to the United States Court of Appeals for the Eleventh Circuit.

The appeals court reversed the order of dismissal and reinstated the Complaint. The case was set for trial and in lieu of an evidentiary hearing, the parties stipulated to the facts and have agreed to submit the matter to the court on memoranda of law.

Plaintiffs contend that they should receive retroactive promotions to the rank of lieutenant, together with lost pay, seniority, pension benefits, and other emoluments office.

STIPULATED FACTS

The parties have agreed that the following facts are not in dispute:

1. Plaintiffs are City of Miami firefighters who passed the 1985 promotional exam for fire lieutenant and were placed on the eligible register.

2. On March 28, 1987, the promotional register expired with Plaintiffs as the only successful candidates not promoted.

3. Plaintiffs would likely have been promoted if rank order promotions were used pursuant to the Rule of 1.

4. The City employed the "Rule of 8" in making certification for a promotion from the register.

5. The departmental goal under the Consent Decree for this period of time was that thirty-eight (38%) percent of all promotions be accorded to hispanic, female and African American employees.

6. At the rank of lieutenant, the City promoted in excess of 38 percent minorities.

7. No person promoted under the Rule of 8 was a victim of prior discrimination in the promotional ranks of the Fire Department.

8. No adverse impact was observed on the promotional exam.

9. On the 1985 exam for lieutenant, ninety-six (96) persons took the test and fifty (50) received a passing score.

10. Of seventeen (17) black test takers, eight (8) or forty-seven (47%) percent passed the test.

11. Of nineteen (19) hispanic test takers, eleven (11) or fifty-eight (58%) percent passed the test.

12. Of sixty (60) Anglo test takers (including the Plaintiffs), thirty-one (31) or fifty-two (52%) percent passed.

13. No female employees competed for selection on this exam.

14. One hundred (100%) percent of black and hispanic employees on the promotional register were, in fact, promoted to lieutenant.

15. Promotion of black and hispanic firefighters to lieutenant from 1985 promotional register exceeded thirty-eight (38%) percent.

16. Plaintiffs met the qualifications for lieutenant during the life of the 1985 promotional register.

ISSUE FOR DETERMINATION

The parties have agreed that the following issue is appropriate for determination by the Court:

> WHETHER THE CITY OF MIAMI'S FAILURE TO PROMOTE THE PLAINTIFFS ON THE BASIS OF THEIR STANDING ON THE 1985 FIRE LIEUTENANT REGISTER WAS A VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000(e), ET SEQ.?

ARGUMENT

Both Title VII of the Civil Rights of [sic] Act of 1964, and the Consent Decree entered in *U.S.A. v. City of Miami*, 75-3096-Civ-Kehoe, expressly prohibits discrimination in the City of Miami workforce on the basis of race, gender, or ethnicity. The race, gender, or ethnicity of the candidate is of no importance. Discrimination against non-hispanic white employees is equally odious as discrimination against African Americans, hispanics or women.

Paragraph 1 of the Consent Decree specifically enjoins the City of Miami and its officials from:

> . . . engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or

> potential applicant for employment with, the City of Miami because of such individual's race, color, sex or national origin. Specifically, the City shall not fail or refuse to hire, promote, upgrade, train, or assign any individual, discharge any individual or otherwise discriminate against any individual as an employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of race, color, sex or national origin.
>
> In no event shall the City be required to hire unnecessary personnel, to hire, transfer, or promote a person who is not qualified, or hire, transfer, or promote a less qualified person, in preference to a better qualified person, consistent with the provisions of this Decree.

Despite that language, in the case of the Plaintiffs the City has in fact discriminated on the basis of race, gender, and ethnicity. The City of Miami set for itself in the Fire Department a thirty-eight (38%) percent quota of minority promotions. It exceeded that number at the rank of lieutenant by promoting nineteen (19) minority candidates. Twenty-four (24) non-hispanic white male candidates were promoted and the seven (7) Plaintiffs were excluded from the promotional process solely because of their race and ethnicity. By promoting nineteen (19) minority candidates out of forty-three (43) positions filled, the City promoted forty-four (44%) percent minorities at the rank of lieutenant. This clearly exceeds its own "goals."

More significantly, the promotional examination revealed no adverse impact on any identifiable group of

test takers. As a result, resort to race and ethnic conscious promotion was not warranted to avoid discriminatory activities. In addition, elimination of the effects of discrimination also did not require the use of a quota system on the basis of race and ethnicity. It is stipulated that not a single one of the hispanic or African American candidates for a promotion was ever a victim of discrimination in the City of Miami workforce. Therefore, since neither adverse impact nor the effects of past discrimination were present, there was no basis to promote some persons because of their race and deny the Plaintiffs their promotion for the same reason.

In *Regents of the University of California v. Bakke*, 483 U.S. 265 (1978), the United States Supreme Court held that any distinction between citizens based on race or ancestry are "by their very nature" odious to free people whose institutions are found on doctrines of equality. The allocation of specific positions to persons of a specific race, gender, or ethnicity was specifically rejected by the United States Court of Appeals for the Ninth Circuit in *Shimkus v. Gersten Companies*, 816 F.2d 1318 (9th Cir. 1987). In *Shimkus*, a housing plan allocated a specific number of vacant low cost housing units to qualified black citizens. Nonblack minorities not only lost these units to African Americans, but were required to compete with whites for the reduced number of vacancies. For this reason, the lower court was found to have abused its discretion in approving such a program. *Id.* at 1321.

That is precisely what has happened in the present case. The purpose of the Consent Decree was to eliminate barriers to promotion. It was not intended to guarantee

promotion to minorities at the expense of non-minority candidates.

In *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993) , the United States Court of Appeals found that the City of Miami has conscientiously attempted to eradicate discrimination in its initial hiring and promotion practices. *Id.* at 1507. The court further held that consent decrees, such as the one which the City uses as justification for discriminating against the Plaintiffs in the present case, are intended to be "provisional and tentative." *Id.* at 1506. Most importantly, the appeals court held that consent decrees are not intended to maintain employment quotas; rather, their only purpose is to remedy the effects of past discrimination. *Id.* at 1506.

The appeals court found that the City of Miami has not engaged in any discriminatory employment practice since the Consent Decree was entered on March 31, 1977. *Id.* at 1507. This means that any person hired or who has stood for promotion in the last eighteen and one-half ($18^1/_2$) years has not been subjected to any discriminatory practice.

In the present case, the Court may observe an example of an affirmative action program which has unnecessarily trammeled the rights of non-minority employees. The City of Miami's own "goal" for minority promotion was exceeded by more than twenty (20%) percent. This clearly resulted in the Plaintiffs being excluded from the promotional process solely on the basis of race and ethnicity. It also establishes that the City made selections solely in its blind pursuit of some social justice on the "basis of the numbers."

Since the initial approval of the Consent Decree in 1977, the Supreme Court has repeatedly revisited the issue of the constitutionality of affirmative action and has substantially changed the law in this area. In *City of Richmond v. J. A. Croson Co.*, 88 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989), the Supreme Court held that voluntary, race conscious, local government affirmative action programs are subject to "strict scrutiny." Under strict scrutiny, an affirmative action plan must be based upon a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest. *Croson*, 488 U.S. at 498-508, 109 S. Ct. at 724-730. When, as here, the effect of a race conscious affirmative action decree is challenged, the District Court must make a factual determination that the public employer "has a strong basis in evidence for its conclusion that racial discrimination necessitates affirmative action." *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

The court in *Ensley* held that a showing of discrimination is relevant to a decree's continued validity. It clearly also applies to the rationale behind the use of a race conscious decree in a set of promotions such as those in the present case. 31 F.3d at 1567. It is, therefore, incumbent upon the public employer to demonstrate that it has a "strong basis in evidence" for its conclusion that past or present discrimination warrants race conscious relief.

Among the factors to be considered in order to ensure that an affirmative action program does not unnecessarily interfere with the rights of innocent, nonminority employees, the impact of race conscious relief on the rights of those employees must be considered. 31 F.3d at 1569.

With regard to specific racial quotas, such as those used to prevent promotion of the Plaintiffs, the court in *Ensley* held:

> Special vigilance is required against unyielding racial quotas that rest upon the completely unrealistic assumption that minorities will choose a particular trade in lock step proportion to their representation in the local population.

Ensley, 31 F.3d at 1569, relying on *Croson*, 488 U.S. at 507, 109 S. Ct. at 729.

A public employment consent decree's race conscious provisions "are valid only to the extent that they promote the compelling government interest, anchored in the constitution, of ending discrimination." 31 F.3d at 1570. The purpose of an affirmative action program cannot be to maintain quotas. *U.S. v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993).

The Eleventh Circuit Court of Appeal addressed with particularity the unfairness in the loss of rights attributable to the endless use of racial quotas in promotional decisions in the recent case *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994).

The Eleventh Circuit Court condemned the use of separate promotions by race, finding that such a system "embodies exactly the sort of danger that personnel decisions would be made by reflects of adherence to a numerical standard that the court cautioned against in *Johnson v. Transportation Agency*, 480 [U.S.] 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987)." *In re Birmingham*, 20 F. 3d at 1541.

The plan approved in *Johnson* resulted in no persons being automatically excluded from consideration. The plan which was condemned in *In Re Birmingham*, and the Miami plan which deserves equal condemnation, excludes all non-minority firefighters from a specific portion of available promotional positions.

While there is no precise formula for determining when an affirmative action program unfairly trammels the rights of nonminority employees such as Plaintiffs, the Eleventh Circuit Court of Appeal in *In Re Birmingham* found it sufficient to say that denial of promotional opportunities resemble layoffs, "in that only specific persons are burdened – those who can reasonable [sic] aspire to promotions within the [department] because they are already employed there and qualified for a promotion." *Id.* at 1542. Therefore, an affirmative action plan can unnecessarily trammel the rights of non-minority employees without requiring firings or layoffs.

It is significant that the *Birmingham* decision held that promotional remedies for past discrimination, using percentages not tied to the percentage of minorities on the job immediately below the promotion position, have withstood scrutiny only when ordered by a court to combat a state or local government's continued refusal to obey a long standing order to develop nondiscriminatory promotional procedures. 20 F.3d at 1543, relying on *U.S. v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053, 94 L.Ed.2d 203 (1987). The administration of the Consent Decree as applied to the Plaintiffs bore no relation to the pool of qualified candidates and was simply "blind hiring by the numbers." None of the employees on the 1985 register who were recipients of race conscious relief were actual

victims of discrimination. According to the undisputed record in this case, the City of Miami did not engage in discriminatory employment practices with regard to the test, nor for the eight years preceding it. Where relief is not provided to identified victims of discrimination, race-neutral alternatives should be considered before our government implements an affirmative action program using race as the sole criterion upon which promotions are based. *In Re Birmingham*, 20 F.3d at 1545-1546. The reason for this is obvious; race conscious decision making is odious in a free society and the purpose of affirmative action is to eliminate discrimination, not impose a new discrimination on persons of other races.

In *Adarand Constructors. Inc. v. Pena*, ___ U.S. ___, 1995 WL 347345, 63 U.S.L.W. 4523 (1995), the Supreme Court held that the application of race conscious relief is constitutional only where it is narrowly tailored to further compelling governmental interests. *Id.* at 4530. In his concurring opinion, Justice Scalia stated:

> In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make-up' for past racial discrimination in the opposite direction. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J. concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our constitution there can be no such thing either as a creditor or a debtor race to pursue the concept of racial entitlement even for the most admirable and benign of purposes is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race

> privilege, and race hatred. In the eyes of government we are just one race here. It is American.

Adarand, at 4534.

The United States Court of Appeals for the Fifth Circuit disapproved a race conscious promotion system which included "skip promotions" on the basis of race in *Black Firefighters Association v. City of Dallas,* 19 F.3d 992 (5th Cir. 1994). In *Black Firefighters,* the agreement required the promotion of twenty-eight (28) "qualified minorities" without regard to whether the individuals were victims of past discrimination. The court in *Black Firefighters* noted that evidence of statistical inequality in the workforce would not justify race conscious relief unless the subjects of the preferential treatment were specific victims of discrimination.

The Fifth Circuit attached particular importance to competition for selection in promotional positions:

> So long as the fire department ranks its employee's exam scores, a firefighter has an expectation that he can earn promotion through study. That expectation is tangible enough that we cannot ignore the problems with the tailoring of this [affirmative action] remedy.

Id. at 992.

In the present case, the Plaintiffs scored higher than a substantial number of persons who were promoted ahead of them. In fact, the Plaintiffs were the only persons on the register who did not receive a promotion. All that they have in common is that they are of one race and persons who were less successful on the promotional exam than they were of another.

Even the City's own Civil Service Rules authorize the use of race conscious relief only when necessary to achieve the purposes of the Consent Decree. The City utilized the "Rule of 8" which involves race conscious relief. Section 8.7 of the City's Civil Service Rules (ordinance 89-77) authorized such an action only "when such additional certification will assist the city in meeting hiring or promotional goals established in the aforesaid Consent Decree or in an affirmative action program established in accordance with federal laws, regulations, or other requirements, or when an examination has adverse impact upon members of protected groups."

The test in the present case was valid. In fact, the highest passing rate on the test belonged to hispanic employees. African American employees passed the test at the rate of ninety (90%) percent of Anglo employees. Yet one hundred (100%) percent of black candidates were promoted and only eighty-one (81%) percent of the Anglo candidates.

All of this discussion of numbers, percentages, and statistics points out the fact that the City simply engaged in "blind hiring by the numbers." It ignored merit and achievement, despite the fact that that is recognized as a legitimate basis for an employee's promotional expectations. In the case of the Plaintiffs, however, those expectations proved of no importance when compared to the City's desire to promote based on some abstract statistical goal rather than proven merit on the job.

The City would argue that its utilization of a higher percentage than its annual goal with regard to the rank of lieutenant was an effort to balance promotions elsewhere

in the Department. In other words, if there were not enough qualified minority candidates to achieve greater numbers of promotions to captain or chief fire officer, then the City could "pile on" minority promotions at the rank of lieutenant. Such an interpretation violates the specific language of Title VII and of the Consent Decree, which says that no employee or candidate for a promotion shall be discriminated against on the basis of race. Exacting a higher toll from candidates for the rank of lieutenant because there were not enough minority promotions at other ranks in the Department places an even higher burden on non-minority lieutenant candidates. There is nothing in the Consent Decree, the City's Civil Service Rules, or in Title VII which authorizes such blatant discrimination.

When non-hispanic white males are victims of discrimination, the cases are, such as in the case of *Birmingham*, referred to as "reverse discrimination." There is nothing reverse about the discrimination in the present case. Title VII does not indicate that some persons may be discriminated against and others not. It prohibits discrimination against any person. Therefore, the discrimination against non-hispanic white males which occurred in the present case is just as much a violation of the Decree and Title VII as it would be if the Plaintiffs in this case were of a different race, ethnicity or gender.

It can be seen from the answers to the interrogatories of the Plaintiffs, which are filed contemporaneously with this memorandum, that many of the minority candidates appointed ahead of the Plaintiffs had less experience on the job and less favorable work records. Moreover, a number of the minorities who were promoted to the rank

of lieutenant received more than one preference on the basis of race or ethnicity in being considered for job assignment.

The Plaintiffs are not claiming that they have an absolute right to be promoted. Whether or not the City chooses to fill a vacancy is the City's economic determination. Once it has decided to fill promotional vacancies, however, it must do so in accordance with the law. *See, City of Miami v. Rezau*, 129 So.2d 432 (Fla. 3d DCA 1961), wherein the Third District Court of Appeal held that when a decision is made to fill a vacancy under the Miami Civil Service Rules, the Rules "provide the method by which a vacancy shall be filled and leave no discretion as to the manner in which it is to be done." *Id.* at 433. The City violated its own Civil Service Rules by utilizing the Rule of 8 when neither adverse impact nor elimination of the effects of prior discrimination were present. The City violated the Consent Decree by promoting persons other than the Plaintiffs solely on the basis of race and ethnicity.

It must be appreciated that failure to promote Plaintiffs to the rank of lieutenant does more than deny them appointment at that rank. While some of the Plaintiffs were later promoted to lieutenant on other examinations, they have all still suffered a loss of pay, seniority, retirement benefits, and other emoluments of office. Assignment within the Fire Department is also based on seniority.

As a result of the unlawful denial of promotional opportunities, the Plaintiffs who have become promoted

to lieutenant lost the opportunity to be promoted to captain while persons unlawfully granted a racial or ethnic preference were permitted to sit for the captain's exam, again to the exclusion of the Plaintiffs.

There is no justification in this record, nor is there justification under the law, for making these Plaintiffs victims of discrimination. The Consent Decree was intended to eliminate discrimination on the basis of race, not substitute one class of victims for another. Despite that fact, that is precisely what happened to the Plaintiffs in the present case and they are entitled to relief under Title VII.

The City's own affirmative action officer, Dr. Hattie Daniels, admits that under the facts proven in this case, the Consent Decree has not been properly administered. In her deposition, Dr. Daniels stated that in order to meet its goals under the Consent Decree that the City is not required to promote less qualified over more qualified candidates. (Daniels Depo. at p. 70).

At page 63 of Daniels' deposition, the following question and answer were given:

> Q: And if the appointing authority in looking at the test score has a number, and that speaks for itself, and if the appointing authority says, 'well, the non-minority candidate had the better interview and the non-minority candidate has had more commendations and less problems on the department than a minority candidate, but both have passed the test and both have promotable criteria and they stand together

> for promotion,' is it a discriminatory practice to select the minority candidate solely because of that person's race or sex?
>
> A: Yes, I suppose, yes.

On the basis of the answers to interrogatories filed in this case, it is clear that the Plaintiffs were superior candidates for a promotion to the lower ranked candidates on the promotional register. There is no evidence that the Plaintiffs had less favorable employment records, less favorable interviews or any other factor which would exclude them from consideration for a promotion. All that the Plaintiffs have in common besides not being promoted is that they were not minorities. The City utilizes the Consent Decree as a justification for its actions. This set of facts, however, is exactly what the Consent Decree was designed to prohibit.

CONCLUSION

The purpose of the City's affirmative action program was to eliminate discriminatory employment practices and to give a remedy to employees who had suffered discrimination in the past. The City's discriminatory practices ended eight years prior to the exam at issue in the present case. No person standing for promotion on the 1985 lieutenant's register was a victim of prior discrimination. The results of the examination had no adverse impact on the basis of race, ethnicity, or gender. There was not [sic] set of facts present in this case that warranted the use of race conscious affirmative action to the detriment of the Plaintiffs.

The Plaintiffs have complained that the Consent Decree was misused to make them victims of discrimination. The use of the Consent Decree under the facts of the present case is simply another form of institutionalized racism, which Title VII and this Court should not tolerate.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgments for the Plaintiffs, awarding them promotion to the rank of lieutenant retroactive to 1985, together with lost wages, seniority, retirement credit, and other emoluments of office. Plaintiffs further request this Court to retain jurisdiction for the purpose of determining entitlement to attorneys' fees and court costs.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Albertine Smith, Chief Assistant City Attorney, City of Miami, 300 Dupont Plaza, 300 Biscayne Boulevard Way, Miami, Florida 33131, this 12 day of December, 1995.

Respectfully submitted,

KLAUSNER & COHEN, P.A.
Attorneys for Plaintiffs
6565 Taft Street
Suite 200
Hollywood, Florida 33024
Telephone: Brow. (954) 981-1222
Dade: (305) 620-6565
FAX: (954) 981-0088

By: /s/ Robert D. Klausner
Robert D. Klausner
Fla. Bar No. 244082

Memo-Law.FJ
LLP/00051690

United States District Court
Southern District of Florida

Case No. 87-1984-Civ-Highsmith

MICHAEL BARFUS, et al.,

Plaintiffs,

vs.

CITY OF MIAMI, a municipal corporation,

Defendant,

_____/

ORDER GRANTING FINAL JUDGMENT PURSUANT TO THE PARTIES' STIPULATED FACTS AND MEMORANDA OF LAW

(Filed April 29, 1999)

THIS CAUSE came before the Court upon reinstatement by the United States Eleventh Circuit Court of Appeals following the Plaintiffs' successful overturning of the dismissal of their complaint.[1] On remand, the parties stipulated to the facts and submitted memoranda of law, upon which the Court agreed to enter a final judgment.

After a review of the stipulated facts, the parties' memoranda of law, and the various exhibits, attachments and other pertinent parts of the file, it is

ORDERED AND ADJUDGED that consistent with the controlling law applied to the stipulated facts, a final judgment in favor of the Defendant City of Miami and against the Plaintiffs is hereby ***GRANTED.***

---

[1] *Barfus v. City of Miami*, 936 F.2d 1182 (11th Cir. 1991)

The Plaintiffs are White, non-Hispanic, male City of Miami firefighters who passed a civil service promotional examination for the rank of "fire lieutenant," who were placed on the promotional register for that position, but who were not promoted. Pursuant to the Plaintiffs' Equal Employment Opportunity Commission complaint, alleging that they were excluded from promotion because they were White, non-Hispanic males, the Commission issued right to sue letters, and the Plaintiffs filed this lawsuit against the City of Miami alleging that the City's failure to promote them violated Title VII of the Civil Rights Act of 1964.

As reflected in the stipulation of facts entered into after remand, the parties agree that at the time the fire lieutenant promotional register expired, the Plaintiffs were the only eligible candidates who had not been promoted, and that it is likely they would have been promoted if rank order (the "Rule of One") had been used as the basis for making promotions, instead of the "Rule of Eight,"[2] which was used by the City in an effort to achieve the thirty-eight percent (38%) departmental employment goal for minorities (Blacks and Hispanics)

---

[2] The "Rule of Eight," that was utilized by the City to achieve its departmental goals, is contained in *Civil Service Rule 8.7*, which provides that a promotional vacancy is to be filled from a list of qualified applicants consisting of the five candidates with the highest standing on the promotional register, and the three candidates with the next highest standing on the promotional register who are members of an affected class prescribed in the Consent Decree, or who are members of an appropriate affected group as defined in Federal regulations.

and women. The parties also agree that in making minority promotions from the fire lieutenant register, the City exceeded thirty-eight percent (38%), that no one promoted under the "Rule of Eight", was the victim of discrimination in the promotional ranks of the fire department, and that no adverse impact was observed on the promotional exam.

Of the ninety-six (96) applicants who took the qualifying exam, fifty (50) passed, including eight (8) of the seventeen (17) Black applicants, eleven (11) of the nineteen (19) Hispanic applicants, and thirty-one (31) of the sixty (60) White (non-Hispanic) applicants. One hundred percent (100%) of the Black and Hispanic applicants who passed the exam were promoted, which exceeded thirty-eight (38%). Finally, although the Plaintiffs met the qualifications for promotion to the rank of fire lieutenant, they were not promoted during the life of the promotional register.

For purposes of entering a final judgment, the parties stipulate to the following issue as determinative of the case: Was the failure of the City of Miami to promote the Plaintiffs on the basis of their standing on the fire lieutenant promotional register a violation of Title VII of the Civil Rights Act (*Title 42, United States Code, Section 2000e, et seq.*)? In resolving this issue, the Court would note that in prior appellate proceedings in this case, it was determined that the Plaintiffs are not challenging the terms of the Consent Decree, and are not seeking to modify it. See *Barfus v. City of Miami, supra,* at 1185. Rather, they are claiming injury as a result of the City's allegedly discriminatory application of the Consent Decree. More particularly, they are claiming that the City discriminated

against them by exceeding the thirty-eight percent (38%) goal for minority promotions authorized by the Decree.[3]

In this regard, the City correctly notes that although the minority promotions made from the fire lieutenant register did, in fact, exceed thirty-eight percent of the total promotions, under the provisions of Paragraph 5(b)[4] of the Consent Decree, the thirty-eight percent goal relates only to the fire department as a whole, and not to any particular promotional register or category within the department. Indeed, no provision of the Decree specifies a goal for any particular departmental promotional register or category. In fact, during the relevant time period in this matter, minorities and women received only about thirty-two percent of departmental promotions. Accordingly, on this basis, because the thirty-eight percent goal was not achieved, it cannot be said that the City misapplied the Consent Decree by utilizing promotional goals

---

[3] The introductory language in Paragraph 5 of the Consent Decree, entitled "Goals," calls for the City to " . . . adopt and seek to achieve as its long term goal the participation at all levels throughout its work force of blacks, Latins and women approximating their representative proportions in the City's labor force . . . " This paragraph also provides that the " . . . purpose of this goal is to eliminate the underrepresentation and uneven distribution of blacks, Latins and women throughout the City's work force."

[4] Paragraph 5(b) of the Consent Decree, entitled "promotions," calls for " . . . promotional goals [to be] establish[ed] for minorities, on a departmental basis, with each department having as its yearly goal, until the long term goal has been met for a period of one year, either parity with the Miami City workforce population statistics or the percentage of minorities currently employed in the department, whichever is smaller."

for minorities in excess of those provided for by the Decree.

Moreover, the City correctly asserts that there was a legitimate basis under the Consent Decree for the application of the City's Civil Service Rules in making the minority promotions from the fire lieutenant register. Specifically, the promotions were properly made pursuant to subsection (b) of Civil Service Rule 8.7, entitled "Additional Certification."[5] In this connection, see *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993), where the Court of Appeals acknowledged the continued underrepresentation of minorities and women in the fire department.

Furthermore, nothing in the Consent Decree provides that race, national origin or gender-conscious promotions may be made only if there is an adverse impact against a particular group on an examination. Indeed, all candidates for promotion pursuant to the fire lieutenant register met the requirements to take the qualifying

---

[5] The provisions of Civil Service Rule 8.7 ("Additional Certification") provide that "[i]n addition to the names certified . . . , the Director of the Human Services Department shall certify . . . the names of the three persons standing next highest as follows: . . . (b) Three members of appropriate protected groups as defined in Federal regulations . . . when such additional certification will assist the City in meeting hiring or promotional goals established in the . . . Consent Decree or in the affirmative action plan established in accordance with Federal laws, regulations or other requirements or when an examination has adverse impact upon members of protected groups."

examination, and all of the candidates who were promoted passed the examination and went through a personnel file review process prior to selection. Thus, even though there was a race and national origin-conscious basis for the fire lieutenant promotions, as discussed above, the Consent Decree provided a legitimate rationale for them. See *Johnson v. Transportation Agency, Santa Clara, California*, 480 U.S. 616, 626-27, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987). Accordingly, entry of a final judgment in favor of the Defendant City of Miami is appropriate.

DONE AND ORDERED in Chambers in Miami, Miami-Dade County, Florida, this 29 day of April, 1999.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
United States
District Judge

Copies furnished to:
Robert D. Klausner, Esq.
Albertine B. Smith, Esq. (Asst City Atty)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11530 FF

MICHAEL BARFUS, JACK CHAMBERS, et al.,

Plaintiffs-Appellants,

versus

CITY OF MIAMI,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___ F.2d ___).

(Filed July 6, 2000)

Before: ANDERSON, Chief Judge, CARNES, Circuit Judge, and OAKES*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

---

* Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-3), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
CHIEF JUDGE

ORD-42
(6/95)

Miami City Charter

Sec. 36. Civil service.

(a) *Creation of board; appointment; terms of office; vacancies; rules and regulations.* A civil service board of the city is hereby created and established. There shall be five members constituting the said civil service board. Three shall be appointed by the commission, and two shall be elected by the employees of the city with civil service status, from said employees with such civil service status. The two so elected shall become members of the board when confirmed by the city commission. All members of the said civil service board shall serve for two years, and they shall take office as soon as appointed and qualified. The commission may remove any member of the board for cause, upon stating in writing the reasons for the removal, after allowing him or her to be heard by the commission in his or her own defense. Any vacancy shall be filled by the commission for the unexpired term. The city manager shall be authorized to prescribe the rules, regulations, and procedure for the holding of election for the purpose of electing the two members of the civil service board by the city employees with civil service status.

(b) *Chairperson; examiner; subordinates.* Immediately after appointment, the board shall organize by electing one of its members chairperson. The board shall appoint a chief examiner who shall be a member of the board and who shall also act as secretary. The board may appoint such other subordinates as may by appropriation be provided for.

(c) *Unclassified and classified service.* The civil service of the city is hereby divided into the unclassified and the classified service.

(1) The unclassified service shall include:

(A) The city manager, his assistants, and secretarial staff;

(B) The heads of departments, members of appointive boards, judges of the city court, the city clerk, chief of police, chief of fire division, and the superintendent of communications division;

(C) Assistants to department heads:

Assistant chiefs of the police division;

All ranks in the police division above the classified position of police captain;

Assistant chiefs of the fire division;

Chief of fire prevention;

Director of training in the fire division;

Battalion chiefs;

Chief of fire rescue;

Assistant to the superintendent of the division of communications;

Director of corrections.

(D) All attorneys employed by the city. The city attorney shall be the supervisor of all attorneys employed by the city. The city attorney shall have exclusive authority regarding, but not limited to appointment,

removal and salary as to assistant city attorneys. The foregoing provisions of subsection (D) shall not apply to those attorneys in the classified service of the city on November 1, 1972.

Attorneys with permanent civil service rights appointed by the city attorney to any applicable unclassified position above, shall retain civil service rights in the position from which selected as may have accrued. Personnel with permanent civil service rights appointed by the city manager to unclassified positions shall retain said civil [service] rights in the position from which selected as may have accrued.

(2) The classified services shall include all positions not specifically included by this charter in the unclassified service. There shall be in the classified service three classes, to be known as the competitive class, noncompetitive class, and labor class.

(A) The competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive examinations.

(B) The noncompetitive class shall consist of all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character, as may be determined by the rules of the board.

(C) The labor class shall include ordinary unskilled labor. (Laws of Fla., ch. 24694(1947); Laws of Fla., ch.

31001(1955); Char. Amend. No. 2, 12-1-63; Char. Amend. No. 2, 1972, 10-7-72; Char. Amend. No. 1, 12-1-74; Char. Amend. No. 3, 12-1-74; Char. Amend. No. 1, 11-4-75)

(d) *Rules; examinations; eligible lists; certiftcation of vacancies.* Subject to the approval of the commission, the board shall adopt, amend, and enforce a code of rules and regulations which shall have the force and effect of law providing for appointment and employment in all positions in the classified service, based on merit, efficiency, character, and industry; shall make investigations concerning the enforcement and effect of this article and of the rules adopted; and shall make an annual report to the commission. The chief examiner shall provide examinations in accordance with regulations of the board and maintain lists of eligibles of each class of the services of those meeting the requirements of said regulations. Positions in the classified service shall be filled from such eligible lists upon requisition from and after consultation with the city manager. When positions are filled, the employment officer shall so certify, by proper and prescribed form, to the director of finance and to the director of the department in which the vacancy exists.

(e) *Promotion.* The board shall provide uniform rules for promotion to all positions in the classified service.

(f) *Power of suspension, removal, fine, or demotion.*

(1) Any officer or employee in the classified service may be, removed, suspended, fined, laid off, or demoted by the city manager or by the head of the department in which

such person is employed, for any cause which will promote the efficiency of the service; but such person must be furnished with a written statement of the reasons therefor within five days from the date of the removal, suspension, fine, layoff, or demotion, and be allowed a reasonable time for answering such reasons in writing, which answer shall be made a part of the records of the board, with the suspension to take effect as of the date that such written statement is furnished. No trial or examination of witnesses shall be required except in the discretion of the city manager or the head of the department. Any employee in the classified service who deems that he or she has been suspended, removed, fined, laid off, or demoted without just cause may, within 15 days of such action, request in writing a hearing before the civil service board to determine the reasonableness of the action. The board shall, within 30 days after appeal of the employee disciplined, proceed to hear such appeal. After hearing and considering the evidence for and against the employee, the board shall report in writing to the city manager its findings and recommendations. The city manager shall then sustain, reverse, or modify the action of the department director. Any member of the civil service board and the director of personnel may administer an oath to witnesses appearing before said board or before said director in an investigation, disciplinary or appeal proceedings,

and they shall have the power to issue witness subpoenas and to compel the attendance of witnesses.

(2) The civil service board shall also have the right to remove or demote any official or employee in the classified service upon written charges of misconduct made by any citizen, but only after reasonable notice to the officer or employee and after a full hearing. It shall also be the duty of the board to fix a minimum standard of conduct and efficiency for each grade in the service. Whenever it appears from the reports of efficiency made to said board for a period of six months that the conduct or efficiency of any employee has fallen below such minimum standard, that employee shall be called before the board to show cause why he or she should not be disciplined. If upon hearing no reason is shown satisfactory to the board, the employee shall be removed, suspended, or demoted, as the board may determine.

(g) *Present employees.* All persons in the employ of the city holding positions in the classified service, as established by this charter, at the time it takes effect, shall, unless their position is abolished, retain same until discharged, demoted, promoted, or transferred, in accordance herewith.

(h) *Certificate of board on payroll account necessary before payment of classified service member.* The treasurer or other public disbursing officer shall not pay any salary or compensation for service to any person holding a position in the classified service unless the payroll or account

for such salary or compensation bears the certificate of the board, by its secretary, that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this charter and of the rules established thereunder.

(i) *Investigations and hearings.* In any investigation conducted by the board, it shall have the power to subpoena and require the attendance of witnesses and the production thereby of books and papers pertinent to the investigation and to administer oaths to such witnesses.

(j) *No discrimination in classified service.* No person in the classified service or seeking admission thereto shall be appointed, demoted, removed, or in any way favored or discriminated against because of political opinions or affiliations. No person holding a position in the classified service shall take part in political management or affairs or in political campaigns during city working hours or with personal property belonging to the city.

(k) *Penalties.* The civil service board, subject to the approval of the commission, shall determine the penalties for the violation of the civil service provisions of this charter.

(l) *Salaries of board and employees.* The salaries of the civil service board and its employees shall be determined by the commission, and a sufficient sum shall be appropriated each year to carry out the civil service provisions of this charter.

Sec. 40-85. Eligible registers.

(a) *Establishment.* The director of the personnel management department shall establish and maintain such promotional and open registers for the various classes or positions as he/she deems necessary or desirable to meet the needs of the service.

(b) *Order of names.* Names of eligibles shall be placed on competitive registers in the order of their final earned rating. In case of ties in the final ratings, names shall be placed on the registers in alphabetical order; when one such eligible candidate is certified, all such eligible candidates with tied scores shall be certified for interviews. Names of eligibles shall be placed on noncompetitive registers as determined by the director of the personnel management department. In the case of open continuous or intermittent recruitment, names of eligibles shall be added to competitive registers in accordance with their scores and to noncompetitive registers as determined by the director of the personnel management department.

(c) *Duration.* The term of eligibility of each register and of the names appearing thereon shall be fixed by the director of the personnel management department at not less than one year nor more than two years. Whenever, for economic purposes, the city manager by memorandum delays the filling of a promotional vacancy, the life of the subject register and all other promotional registers affected thereby shall be extended for a period of time equal to that time occasioned by the delay. Any register that has been in effect for more than one year may be

abolished or extended at any time by the director of the personnel management department. For the purpose of this rule, the life of an eligible register begins on the date the eligible register is established.

(d) *Changes in availability of eligibles.* It shall be the responsibility of eligibles to notify the director of the personnel management department in writing of any change of address or other change affecting availability for employment.

(e) *Removal of names.* The names of any person appearing on a register may be removed by the director of the personnel management department if the eligible requests in writing that his/her name be removed or if he/she cannot be located by postal authorities or other means of ordinary, communication within five days following the date of notification. The name of any eligible may also be removed if the name has been certified for appointment three separate times and has not been appointed, or if the eligible has waived appointment twice in the same class of position. Any cause specified in these rules for the rejection of applications may likewise be cause for the removal of the name of an eligible from the register on which it appears.

(Ord. No. 8977, § 2 (rule 7 (7.1-7.5)), 7-24-79; Ord. No. 10163, § 1, 10-7-86; Code 1980, § 40-60)

Sec. 40-86. Vacancies to be filled by appointments from eligible registers.

Except as otherwise provided in this article, every vacancy in the classified service shall be filled by appointment from the appropriate eligible register.

Appointments shall be made to, or employment shall be given in, all positions in the classified service by selection of persons certified by the director of the personnel management department.

(Ord. No. 8977, § 2 (rule 8 (8.1)), 7-24-79; Code 1980, § 40-61)

Sec. 40-87. Request for certification of eligibles for appointments (requisition).

Whenever the city manager shall request certification from the director of the personnel management department for appointment to, or employment in, any position in the classified service, he/she shall specify the title and duties for such position, so that certification may be made from the appropriate eligible register, or, when necessary, a proper eligible register may be prepared as the result of an examination held for that purpose.

(Ord. No. 8977, § 2 (rule 8 (8.2)), 7-24-79; Code 1980, § 40-62)

Sec. 40-88. Manner of certification of eligibles for appointment.

(a) *From open competitive registers.*

(1) *For positions other than police officer.* The director of the personnel management department shall certify from the appropriate eligible register the five persons who stand the highest thereon. Eligibles not selected shall be returned to the register in accordance with their relative grades. Only under unusual and exceptional conditions

satisfactory to the board shall the names of eligibles be passed over.

(2) *For position of police officer.* The director of the personnel management department, as soon as practicable, shall certify from the police officer eligible register at least 25 percent of the register (not to exceed 50 eligibles at any time) who stand highest thereon, giving their names, addresses and examination grades. Selection shall be made for appointment from the eligibles thus referred, and additional eligibles shall be referred, as necessary.

(b) *From promotional competitive registers.* The director of the personnel management department shall certify from the appropriate register for each vacancy the names of the five persons who stand highest thereon. Only under unusual conditions, satisfactory to the board, shall the names of eligibles be passed over.

(c) *From noncompetitive registers.* The director of the personnel management department shall certify a list of candidates which may be limited to those whom he/she deems most qualified.

(d) *From labor registers.* The director of the personnel management department shall certify from an established eligible register a list of candidates which may be limited to those he/she deems most qualified.

(e) *Additional certification.* In addition to the names certified as provided above, the director of the personnel management department shall certify from the same or another appropriate list the names of the three persons standing next highest as follows:

(1) Three members of the affected class as prescribed in the consent decree, United States v. City of Miami, case no. 75-3096-CIV-JE, S.D. Fla.,* or

(2) Three members of appropriate protected groups as defined in federal regulations, when such additional certification will assist the city in meeting hiring or promotional goals established in the aforesaid consent decree or in an affirmative action plan established in accordance with federal laws, regulations or other requirements or when an examination has adverse impact upon members of protected groups. When more than one vacancy exists, the director of the personnel management department shall certify the next name on the register and the next member of the affected class or protected group, as appropriate. If special requirements of sex, domicile or the possession of special qualifications are properly justified, the director of the personnel management department may also certify the names of not more than three persons who best meet such special requirements. When there are insufficient names on the register or other appropriate list to certify the number prescribed above, the director of the personnel management department may require appointment from among the names remaining or may establish a new register in order to meet the objectives of the city's merit system and the

---

***Editor's note** – The consent decree referred to herein was entered Feb. 18, 1976, vacated April 2, 1976, and reentered as modified March 31, 1977. On appeal to the United States Court of Appeals for the Fifth Circuit, the modified consent decree was affirmed in United States v. City of Miami 614 F2d 1322.

applicable requirements of the aforesaid consent decree and other federal requirements.

The categorization of persons on the basis of race, color or national origin with respect to their identification for certification for employment or promotion under this section must be established at the time of application. The ethnic category marked on the application form at the close of recruitment must remain in force for the duration of the register.

(Ord. No. 8977, § 2 (rule 8 (8.3-8.7)), 7-24-79; Ord. No. 10282, § 1, 6-11-87; Code 1980, § 40-83)

(2)

Supreme Court, U.S.
FILED
NOV 0 5 2000
CLERK

No. 00-524

IN THE
Supreme Court of the United States

MICHAEL BARFUS, *et al.*,

Petitioners,

v.

CITY OF MIAMI, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ALEJANDRO VILARELLO
City Attorney
MYRNA D. BRICKER*
Assistant City Attorney
444 S.W. 2nd Avenue
Suite 945
Miami, Florida 33130
(305) 416-1800

* *Counsel of Record*

Attorneys for Respondent

163798

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

12 pgs

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	4
I. Neither The Record Nor The Decision Of The Eleventh Circuit Court Of Appeals Raises The Questions Presented By The Petition.	4
II. The Eleventh Circuit Decision Does Not Conflict With Established Precedent Of This Court In Any Respect.	6
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 7

Barfus v. City of Miami, 936 F.2d 1182 (11th Cir. 1991) 1, 2, 3, 8

Black Fire Fighters Ass'n. of Dallas v. City of Dallas, 19 F.3d 992 (5th Cir. 1994) 7

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) 7

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 7

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 6

United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993) 4

United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997) 1

United States v. City of Miami, 195 F.3d 1292 (11th Cir. 1999), *cert. denied*, __ U.S. __, 148 L. Ed. 2d 20 (2000) (U.S. Oct. 2, 2000) ... 1

Rule:

Civil Service Rule 8.7 3

STATEMENT OF THE CASE

Since 1977, the City of Miami ("City") has operated under a court-approved, court-enforced consent decree, an affirmative action program resulting from the settlement of a lawsuit brought by the United States of America against the City to remedy past practices of discrimination in the hiring and the promotion of minorities and to eliminate illegal discrimination in the employment practices of the City. (App. 15-37). The firefighters' union, the International Association of Firefighters, AFL-CIO Local 587, participated in the negotiations and in 1978 signed the decree. *See Barfus v. City of Miami*, 936 F.2d 1182, 1184 (11th Cir. 1991). The consent decree has governed the hiring and promotional practices of the City until 1997, when the Eleventh Circuit Court of Appeals instructed the district court to dissolve the consent decree provisions relating to promotions. *See United States v. City of Miami*, 115 F.3d 870, 874 (11th Cir. 1997).

In 1979, the City amended its civil service rules to enhance the employment opportunities for minorities and to help meet the promotional goals established by the consent decree by adopting Ordinance No. 8977. (App. 26, 28-29). Ordinance No. 8977 includes the so-called "Rule of Eight", a certification procedure for promotions described in footnote 2 on pages 4 and 5 of the Petition. In 1983, the Rule of Eight was approved by the district court as being consistent with the goals of the consent decree. *See United States v. City of Miami*, 195 F.3d 1292, 1296 n.2 (11th Cir. 1999), *cert. denied*, __ U.S. __, 148 L. Ed. 2d 20 (2000) (U.S. Oct. 2, 2000) (No. 99-1858).

On October 28, 1987, while the consent decree was in full force and effect, seven white, non-Hispanic male City

of Miami firefighters, including Petitioner Michael R. Barfus (collectively, "Firefighters"), filed a complaint against the City, seeking a permanent injunction and other remedial relief under Title VII of the Civil Rights Act of 1964. They alleged that the City discriminated against them in favor of less qualified minorities in that they, as white, non-Hispanic males, were the only persons who successfully passed the 1985 City of Miami fire lieutenant promotional exam who were not promoted to the rank of fire lieutenant, and that the reason they were not promoted was because of their race and ethnicity. The Firefighters further alleged that by exceeding the promotional goal of 38% minorities authorized by the consent decree, the City had transformed its affirmative action program into a form of reverse discrimination.

On May 25, 1989, the district court dismissed the Firefighters' complaints as impermissible collateral attacks on the consent decree, concluding that since the plaintiffs were all members of the firefighters' union which had participated in the negotiations and had signed on to the consent decree, their sole remedy was to bring civil contempt proceedings against the City in the court which had jurisdiction over the decree.

On appeal, the Eleventh Circuit Court of Appeals reversed and remanded, determining that the Title VII complaints did not constitute collateral attacks on the consent decree because the Firefighters were not seeking relief pursuant to the decree or seeking to modify the decree, and that individual firefighters did not waive their right to bring independent actions under Title VII simply because of their union's participation in the consent decree negotiations and its signature on the decree. *See Barfus*, 936 F.2d at 1185-86.

However, the Court of Appeals set legal boundaries for the Firefighters' actions, making it clear that the Firefighters could proceed under Title VII to prove injury allegedly caused by the City's discriminatory application of the consent decree, but they could not seek relief pursuant to the decree itself. *See id.* at 1188-89.

On remand to the district court, the parties stipulated to the facts and submitted memoranda of law in support of their respective positions. The district court entered final judgment in favor of the City, finding no unlawful application of the consent decree or violation of Title VII of the Civil Rights Act of 1964 in the City's failure to promote the Firefighters. (App. 58-63).

The district court concluded that the City did not discriminate against the non-Hispanic white male Firefighters in not promoting them, since the City did not exceed the promotional goals authorized by the consent decree in promoting more than 38% minority candidates to fire lieutenant. The court reasoned that under the provisions of paragraph 5(b) of the consent decree (App. 28), the 38% goal related to the fire department as a whole, and not to any particular promotional register or category within the department; and that according to the record evidence, minorities and women received only about 32% percent of the promotions in the department during the relevant time period. The district court noted further that there was a legitimate basis under the consent decree for the City's application of Civil Service Rule 8.7 in making the minority promotions from the fire lieutenant register, as the underrepresentation of minorities and women in the fire department and the continued validity of the consent decree had been acknowledged by the Eleventh Circuit Court of

Appeals as recently as 1993 in *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993). Finally, the court observed that all of the candidates who were promoted to fire lieutenant passed the examination and were qualified in all respects for promotion.

After reviewing the entire record of the district court proceeding, the Eleventh Circuit Court of Appeals affirmed the decision of the district court, determining that the Firefighters had failed to adduce any evidence to prove that the Rule of Eight or the additional certification provisions of the civil service rules were inappropriately invoked, (App. 2), or that there was any discrimination in the competitive process. (App. 3). The Court of Appeals rejected the Firefighters' conclusory assertion that they were better qualified than the minorities actually promoted, as not being supported by evidence in the record. The Court of Appeals refused to address other arguments made by the Firefighters as constituting disguised collateral attacks on the consent decree in contravention of the Court of Appeals' mandate relating to the prior appeal. (App. 2 n.1).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE RECORD NOR THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS RAISES THE QUESTIONS PRESENTED BY THE PETITION.

The Eleventh Circuit Court of Appeals' decision is plainly correct and is not in conflict with any decisions of this Court or of any circuit court of appeals as to a municipality/ employer's application or implementation of a court-

approved affirmative action plan for making race, sex, and national origin-conscious promotions. Both the consent decree and the City's selection procedures for implementing the promotional goals of the decree have been scrutinized in numerous proceedings which have come before both the United States District Court for the Southern District of Florida and the Eleventh Circuit Court of Appeals over the approximately twenty-year lifespan of the decree. Neither the decree nor the City's selection procedures have been found to offend the United States Constitution or to be inconsistent with the purpose of Title VII. Moreover, Petitioners were expressly precluded in this case from challenging the terms of the decree or from seeking relief from the terms of the decree itself.

In implementing the promotional goals of the consent decree, the City did not use race-based promotional quotas, nor did the City exclude any class of employees from promotion because of race. The City's promotional procedures did not establish "set-asides" for women or other minorities. No such rigid numerical standards or exclusionary practices were utilized in the City's selection procedures. Indeed, Petitioner's use of words such as "quotas," "set-asides," or "exclusion of a class on the basis of race" scattered throughout the Petition in an effort to construct a basis for the question presented are irresponsible and misleading, as there is nothing in the record to support Petitioners' conclusory assertions that the City employed such practices in promoting firefighters to the rank of fire lieutenant.

All those promoted to fire lieutenant were qualified for the position. All had four years of continuous satisfactory service in the rank of firefighter, passed the promotional examination, had their personnel files reviewed, and, in many

instances, were interviewed prior to being selected for promotion. Test score was one of many factors considered, as was race or ethnicity. Petitioner's contention that the white, non-Hispanic Firefighters were entitled to be promoted over the minority candidates who were selected because of their higher test scores disregards the fact that many criteria, including test scores, were considered by the City in making promotion selections. The Firefighters' contention also ignores the validity and purpose of the affirmative action plan for promotions mandated by the consent decree. The consent decree provided a proper rationale for the race and national origin-conscious promotions that were made. *See Johnson v. Transportation Agency*, 480 U.S. 616, 626-627 (1987).

II.

THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT IN ANY RESPECT.

In an attempt to create a conflict with precedent of this Court where there is none, Petitioners try again to do what they were precluded from doing in both the district court and in their appeal to the Eleventh Circuit, that is, to challenge the legality of the consent decree itself. Unwilling to keep within the legal boundaries established by the Eleventh Circuit in the first appeal, and undaunted by the Eleventh Circuit's admonitions and refusal to consider the Firefighters' disguised collateral attacks on the consent decree in the second appeal, the Firefighters now seek by this Petition to challenge in this Court the legality of the decree. Petitioners' attack on the validity and/or legality of the decree is readily discerned not only in the question

presented for review, but also in the cases upon which Petitioners rely to assert conflict. First, Petitioners discuss decisions of this Court establishing constitutionally permissible standards for governmental action based on race. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). Petitioners go on to discuss decisions of the Eleventh and Fifth Circuits in which the legality of a particular consent decree or affirmative action plan is being challenged and in which the court's inquiry is necessarily focused on such issues as whether race-based remedies are necessary to remedy past discrimination, or whether there is a strong basis in evidence for minority or gender-based relief, or whether the decree under review is consistent with Title VII's purpose. *See, e.g., Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (order modifying consent decrees reversed in part and remanded for determination of whether city and county personnel board had strong evidentiary basis to warrant race-based affirmative action provisions of consent decree and where consent decree was flawed in providing no deadlines for race-based selection procedures and was not sufficiently related to goal of eradicating gender discrimination); *Black Fire Fighters Ass'n. of Dallas v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994) (proposed consent decree which used "skip promotions" to promote blacks over non-blacks who scored higher on promotion exams in violation of equal protection clause rejected). None of these cases involves a discriminatory application or implementation of an affirmative action plan which has already been court-approved and determined necessary to remedy past discrimination. Yet, that was the single issue decided in this case.

Petitioners appear to be unwilling to accept the fact that neither the legality of the consent decree nor of any of its provisions which authorize race and gender-conscious selection procedures for promotions was at issue in the instant case. The Court of Appeals made clear in *Barfus* that the actions of the Firefighters were intended to challenge the City's application or implementation of the consent decree as discriminatory and were not to be used as vehicles to collaterally attack the consent decree itself. As previously stated, the Court of Appeals refused to address many of the arguments made by the Firefighters on appeal (many of which are repeated in the Petition) as being nothing more than disguised attacks on the consent decree.

The record evidence showed that under the City's selection procedures for promotions, race, ethnicity, and gender were but one of several factors used in making promotion selections. Test score was one of the factors. All the applicants who were certified and who competed for promotions were fully qualified for the job. There was no evidence of any inflexible adherence to a numerical standard, no evidence of set-asides or of a racial quota system, no evidence of any other kind of constitutional infirmity illustrated by the cases cited by Petitioners. While Petitioners have continued to denounce in general, conclusory terms the societal evils of race-conscious decision-making and have continued to allege that the City's promotional policy was to intentionally exclude the Firefighters because of their race or ethnicity, they failed to demonstrate to either the district court or to the Court of Appeals any aspect of the City's application or implementation of its affirmative action program which excluded the Firefighters or discriminated against them by denying them the opportunity to compete for promotion. Since the Firefighters failed to prove

discrimination in the City's application or implementation of the decree or promotional procedures, the Eleventh Circuit correctly affirmed the decision of the district court.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

ALEJANDRO VILARELLO
City Attorney
MYRNA D. BRICKER*
Assistant City Attorney
444 S.W. 2nd Avenue
Suite 945
Miami, Florida 33130
(305) 416-1800

Attorneys for Respondent

* *Counsel of Record*

(3)

Supreme Court, U.S.
FILED

DEC 18 2000

OFFICE OF THE CLERK

No. 00-524

In The

Supreme Court of the United States

MICHAEL R. BARFUS, et al.,

Petitioners,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT D. KLAUSNER*
ROBERT D. KLAUSNER, P.A.
10059 N.W. 1st Court
Plantation, Florida 33324
(954) 916-1202

**Counsel of Record*
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11PP

QUESTION PRESENTED FOR REVIEW

1. DOES THE ELEVENTH CIRCUIT DECISION CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL QUOTAS WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE?

LIST OF PARTIES TO THE PROCEEDING

Michael Barfus

Jack Chambers

Darrell Hawks

Edmond Lamb

Robert Robinson

Terry Remland

Michael Fisher[1]

City of Miami, Florida

---

[1] Michael Fisher originally participated as a plaintiff in this action but is not a party to this appeal.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL PREFERENCES WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Aderand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) 4, 5

City of Richmond v. J.A. Croson Company, 488 U.S. 469, 108 S.Ct. 1010, 98 L.Ed.2d 845 (1989).....4, 5

Hill v. Ross, 183 F.3d 586 (7th Cir. 1999)..... 4

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996)..... 5

Johnson v. Transportation Agency, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987)..... 4

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)..... 4

SUMMARY OF THE ARGUMENT

The City does not dispute that the percentage of minorities promoted to Fire Lieutenant under the Consent Decree exceeded the City's thirty-eight percent departmental promotional goal. Nor does the City dispute that it utilized a department-wide promotional goal which did not accurately take into account the number of qualified applicants for promotion to Fire Lieutenant. The department-wide goal included civilians ineligible for consideration for promotion to Fire Lieutenant and assumed the participation of women, when in fact no female firefighters competed for selection on the promotional examination at issue. In effect, the City takes the position that the Consent Decree provided it with the plenary authority to promote an unlimited number of minority candidates for Lieutenant so long as total departmental promotions did not exceed the thirty-eight percent departmental goal. The City's position is contrary to the well-established authority of this Court and the Eleventh Circuit. The Eleventh Circuit Court's refusal to recognize the existence of unlawful discrimination against the Firefighters on these facts constitutes a departure from well-established precedent sufficient to justify this Court's acceptance of Certiorari jurisdiction.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL PREFERENCES WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE.

The City's use of a department-wide promotional goal which did not take into account the number of qualified applicants for promotions to the rank of fire lieutenant violated Title VII. Moreover, the City exceeded the flawed department-wide goal, despite the fact that the promotional goal included ineligible civilians and assumed the participation of women where no female firefighters competed for selection on the promotional exam in question. Petitioners respectfully pray this Honorable Court to accept jurisdiction in this matter and consider this case on its merits.

The City argues that notwithstanding the fact that forty-four percent of the candidates promoted to Fire Lieutenant were minorities, it did not exceed the City's thirty-eight percent department-wide promotional goal. The City also attempts to defend its discriminatory promotion practices by arguing that test scores were only one of several factors used in the promotion process.

Due to the relative lack of minority candidates at higher levels in the Department, the City sought to pile on promotions at the Lieutenant level. This was not only in disregard of the Consent Decree's requirement that

promotions be made subject to the availability of qualified applicants, but also ignored the significant fact that there were no female candidates competing for promotion to Fire Lieutenant. Accordingly, the City's blind adherence to an arbitrary promotional goal was discriminatory and in violation of the Consent Decree's prohibition against discrimination on the basis of race.

The fact that the City fell short of its overall departmental promotional goal does not justify the preferential promotion of an unlimited number of minorities at the Lieutenant level. By not taking into effect the number of qualified applicants, the thirty-eight percent departmental promotional goal was discriminatory, particularly as applied at the Lieutenant level where no female candidates had applied for promotion.

The City's statement that test scores were only one of several factors considered ignores the record evidence to the contrary. First, Ms. Daniels, then the City's Affirmative Action officer, testified that interviews were discretionary and not universally used in the promotion process. [R. 43 (deposition of Hattie Daniels at p. 70)]. Ms. Daniels further testified that the departmental promotional goal did not take into account the number of minority candidates eligible for promotion at the Lieutenant level. [R. 43 at p. 53]. Secondly, Plaintiffs were the only firefighters on the promotional list who did not receive promotions, notwithstanding their higher test scores. Moreover, the 1982 and 1983 promotional registers for Lieutenant were terminated after being in place for only half of their normal duration once all minority candidates were promoted regardless of rank.

The City argues in conclusory fashion that the case authority relied upon by the Petitioners is inapplicable because the legality of the Consent Decree had never been challenged. The City misses the point. Although the legality of the Consent Decree itself is not challenged in this action, Petitioners' Title VII suit is based on the theory that the City's actions constituted the discriminatory application of the Consent Decree and that the City's arbitrary promotional goals were in violation of the terms of the Consent Decree and, consequently, a violation of Title VII.

It is undisputed that the number of qualified applicants (firefighters with the necessary time in grade and successful completion of the promotional exam) was never considered by the City in making race-based preferential promotions which exceeded the City's 38% promotional goal. This Court has long held that race-conscious remedies are subject to strict scrutiny and that promotional goals must take into account the qualifications of the relevant applicant pool. *See City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The City's reliance upon this Court's decision in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) is misplaced. *Johnson* has clearly been revised by later decisions of the Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999) (Easterbrook, J.) (indicating that some of the "underpinnings" of *Johnson* were removed by *Adarand*). These later cases establish that any use of race-conscious preferences must be judged on the basis of strict scrutiny. *See*

Adarand, 515 U.S. at 227. When strictly scrutinized, race-based preferences must be narrowly tailored to further a compelling governmental interest. *Id.*

Under strict scrutiny, racial preferences are only permissible as a remedy for past discrimination. In order to receive a preference, one must also be an actual victim of discrimination. The recipients of race-based preferences in this case met neither criteria. *See Croson*, 488 U.S. at 498-500 (holding that past societal discrimination against a group confers no basis to provide a remedy to current members of that group); *Hopwood v. Texas*, 78 F.3d 932, 949 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (indicating that justification for an affirmative action program must be based on "the present effects of past discrimination"). Mere blind adherence to the numbers is no longer the law of the land. *See Hopwood*, 78 F.3d at 941 (observing that the Supreme Court has consistently "rejected arguments conferring benefits on a person based solely upon his membership in a specific class of persons").

The only victims in this case are the six white male firefighters who were denied promotions and career advancement solely on the basis of race. Their working lives have been irrevocably altered in the same way that all victims of racial discrimination are scarred. Thus far, justice has eluded them, but the law clearly supports their claims. The intervention of this Court is the only hope for these six firefighters, now in the twilight of their careers, to achieve the economic rewards wrongfully deprived them. If true racial equality for *all* workers is

truly the Law of the Land then the acceptance of jurisdiction by this Court is fully warranted.

CONCLUSION

This Court has repeatedly held that race-conscious remedies are subject to strict scrutiny and must take into account the qualifications of the relevant applicant pool. Nevertheless, the City arbitrarily used a flawed departmental promotional goal which failed to take into account the qualifications necessary for promotion to the rank of Fire Lieutenant. The Eleventh Circuit erred by holding that the Petitioners failed to prove discrimination on these facts. The Petitioners respectfully assert that the Eleventh Circuit's decision constitutes an irreconcilable conflict with this Court's decisions. Wherefore, for the foregoing grounds and reasons, Petitioners respectfully pray this Honorable Court to accept jurisdiction in this matter and consider this case on its merits.

Respectfully submitted,

ROBERT D. KLAUSNER
ROBERT D. KLAUSNER, P.A.
10059 N.W. 1st COURT
Plantation, Florida 33324
(954) 916-1202